Department of
Criminal Justice Training

Kentucky Justice and Public Safety Cabinet

2009

Kentucky Leadership Institute

Leadership is a behavior, not a position

CASE LAW UPDATES

KENTUCKY COURT OF APPEALS -
KENTUCKY SUPREME COURT
SIXTH CIRCUIT COURT OF APPEALS
U.S. SUPREME COURT 2009-10 TERM

John W. Bizzack, Ph.D.
Commissioner

Department of
CRIMINAL JUSTICE TRAINING
KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

KENTUCKY
LEADERSHIP
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The Leadership Institute Branch of the Department of Criminal Justice Training offers a Web-based service to address questions concerning legal issues in law enforcement. Questions can now be sent via e-mail to the Legal Training Section at

docjt.legal@ky.gov

Questions concerning changes in statutes, current case laws and general legal issues concerning law enforcement agencies and/or their officers acting in official capacity will be addressed by the Legal Training Section.

Questions concerning the Kentucky Law Enforcement Council policies and KLEFPF will be forwarded to the DOCJT General Counsel for consideration.

Questions received will be answered in approximately two or three business days.

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NOTE:

General Information concerning the Department of Criminal Justice Training may be found at http://docjt.ky.gov. Agency publications may be found at http://docjt.ky.gov/publications.asp.

In addition, the Department of Criminal Justice Training has a new service on its web site to assist agencies that have questions concerning various legal matters. Questions concerning changes in statutes, current case laws, and general legal issues concerning law enforcement agencies and/or their officers can now be addressed to docjt.legal@ky.gov. The Legal Training Section staff will monitor this site, and questions received will be forwarded to a staff attorney for reply. Questions concerning the Kentucky Law Enforcement Council policies and those concerning KLEFPF will be forwarded to the DOCJT General Counsel for consideration. It is the goal that questions received be answered within two to three business days (Monday-Friday). Please include in the query your name, agency, and a day phone number or email address in case the assigned attorney needs clarification on the issues to be addressed.

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PENAL CODE - SELF DEFENSE

Wines v. Com., 2009 WL 1830805 (Ky. 2009)

FACTS: Brashear and Wines were long-time friends and socialized frequently. On April 14, 2005, in Louisville, Brashear asked Wines if he and another friend, Langan, could come to Wines's home and purchase some marijuana. Wines, however, became angry, accused Langan of being police and ordered Brashear not to come to the house. Later that evening, Brashear and Langan were visiting Brashear's sister, who lived a few doors from Wines, as well as the home of another friend who lived across the street from the sister. Brashear heard Wines start "calling him names and inviting him to fight." Brashear walked towards Wines's house and the two "exchanged insults." Wines went to the end of his driveway and dared Brashear to step onto the property. Brashear denied that he did so, but later stated that Wines struck him on the head with a nunchuka. Police were called and Wines was arrested. The first grand jury did not indict Wines for assaulting Brashear.

During Wines's brief stay in jail for the assault, he wrote to Hamilton concerning several matters. Hamilton was a drug dealer who kept certain "supplies" at Wines' house, and he also had a key to the house. Nelson, Hamilton's girlfriend, began spending time with Wines, and eventually began to divide her time between the two. Hamilton entered Wines's house twice in May, 2005 and attacked Nelson. On June 12, 2005, he came to the house and called to Nelson to come out to talk to him. Wines called police, but Hamilton left before their arrival. Wines confronted Nelson and told her to choose between the two men, but Nelson said she would never completely leave Hamilton. "Wines allegedly grew furious and declared that he would kill his former friend." At about 4 a.m., Hamilton came back to the house. Eventually, during a confrontation, Wines stabbed Hamilton multiple times, killing him.

Wines was arrested for the homicide. During the next term of the grand jury, he was indicted both on that offense as well as the earlier assault. He moved to sever the two cases for trial but was denied. Wines was convicted of murder and assault and appealed.

ISSUE: May the prosecution offer evidence (probable cause) to refute a claim of immunity under KRS 503?

HOLDING: Yes

DISCUSSION: Wines "claimed self-defense in both cases, each of which ended with an unarmed 'friend' of Wines either injured or dying within feet of Wines's residence." In the situation with Brashears, Wines argued that he believed Brashear had a knife and that he struck him because of that threat. In the Hamilton case, in contrast to what Nelson stated, Wines claimed Hamilton came up on the porch and forced his way inside the house and beat Wines. However, in both situations, there was also evidence "tending to show that Wines planned to use self-defense as a pretext for a premeditated attack." "Nelson testified that Wines told her he was lodging the police complaints to make Hamilton look like the aggressor, so that when he finally did kill Hamilton he would get off." The Court agreed that the crimes "reflected a common scheme and each provided evidence that the other crime had been similarly planned to appear as an act of justified self-defense." The Court further agreed that despite the changes made in KRS 503 subsequent to the events, that the substantive changes to the law were not retroactive. However, the Court held that the immunity provision,

which was procedural, could be applied to this case. However, the Court agreed that Wines was not entitled to immunity, as the prosecution had produced sufficient evidence to refute his claim to it.

Finally, the Court agreed that admitting the tape-recorded statement made by Nelson to investigating officers was hearsay, but further agreed that it was admissible as an excited utterance under KRE 803(2). The Court looked to the eight factors to be used to consider if a specific statement qualified:

> (i) lapse of time between the main act and the declaration, (ii) the opportunity or likelihood of fabrication, (iii) the inducement to fabrication, (iv) the actual excitement of the declarant, (v) the place of the declaration, (vi) the presence there of visible results of the act or occurrence to which the utterance relates, (vii) whether the utterance was made in response to a question, and (viii) whether the declaration was against interest or self-serving .[1]

In addition, Det. Sherrard (Louisville Metro PD) had testified that he interviewed Nelson in the back of his car about two hours after the murder and that she was "crying and hysterical." Her statement was, the Court concluded, a "spontaneous outpouring under the influence of her distress." After addressing several other issues, the Court upheld Wines's conviction.

Rodgers v. Com., 285 S.W.3d 740 (Ky. 2009)

FACTS: On Aug. 21, 2004, McAfee, Palmore, and Eubanks were having a barbecue in the backyard of McAfee's home. Rodgers and Eddings, who knew Eubanks, joined them late that evening. Everyone talked, listened to music, and possibly drank some beer and smoked some marijuana. Shortly after midnight, an argument arose between McAfee and Rodgers. Palmore tried to intervene. Eubanks, who had gone into the house, returned to find the argument ongoing; she joined Palmore in urging Rodgers to leave. Rodgers "apparently backed out of the backyard and along the side of the house toward the front." When he was almost to the front, "both men shoved the women aside and, according to Palmore and Eubanks, Rodgers produced a gun and fired several shots at McAfee." (The number was disputed.) Eddings then approached and "fired two additional shots at the prone McAfee" - although Palmore testified that McAfee was still standing when Eddings shot him from the rear. Rodgers and Eddings fled and McAfee died.

Both Eddings and Rodgers were arrested. Both gave statements to Det. Whelan (Louisville Metro PD). Rodgers admitted to the shooting, but claimed that McAfee was the aggressor, that the gun was McAfee's and that he'd wrestled it away from McAfee. He stated the first shot was an accident and that the he then fired at McAfee to "deter McAfee's assault." (Det. Whelan testified as to his statements to her, but "limited her testimony to Rodgers's admissions without his self-defense qualifications." She testified as to his self-defense claims on cross.)

Rodgers was convicted of first-degree manslaughter, and Eddings' faced retrial as his jury could not reach a decision.

ISSUE: What is the burden of proof for a claim of immunity under KRS 503?

HOLDING: Probable cause

[1] Souder v. Com., 719 S.W.2d 730 (Ky. 1986).

DISCUSSION: The first issue the Court addressed was the argument that the joint trial of the two men was unfair, because statements against each other were partially admitted. The Court agreed that in this case, the error, if any, was harmless.

The primary issue in this case, however, was the application of the 2006 changes to KRS 503 (with respect to self-defense) to an offense that occurred in 2004. Rodgers claimed that he was entitled to immunity under the new law, but the Court agreed that the new law cannot be applied retroactively. In addition, the Court agreed that the statute did not specify "who bears the burden of proof or what standard of proof applies," and the trial court "imposed on the Commonwealth a directed verdict standard." The Court agreed the Commonwealth met that standard because of conflicting testimony from the two women who were at the scene. Further, the Court agreed that the statute itself indicated that "probable cause" was the standard, and that not only law enforcement, but the "prosecutor and the courts may also be called upon to determine whether a particular defendant is entitled to KRS 503.085 immunity."

The Court noted:

> Thus, in order for the prosecutor to bring charges or seek an indictment, there must be probable cause to conclude that the force used by the defendant was not fully justified under the controlling provisions or provisions of KRS Chapter 503. Similarly, once the matter is before a judge, if the defendant claims immunity, the court must dismiss the case unless there is probable cause to conclude that the force used was not legally justified.

Further:

> Because immunity is designed to relieve a defendant from the burdens of litigation, it is obvious that a defendant should be able to invoke KRS 503.085(1) at the earliest stage of the proceeding. While the trial courts need not address the issue sua sponte, once the defendant raises the immunity bar by motion, the court must proceed expeditiously. Thus a defendant may invoke KRS 503.085 immunity and seek a determination at the preliminary hearing in district court or, alternatively, he may elect to await the outcome of the grand jury proceedings and, if indicted, present his motion to the circuit judge. A defendant may not, however, seek dismissal on immunity grounds in both courts. Once the district court finds probable cause to believe that the defendant's use of force was unlawful, the circuit court should not revisit the issue. In the case of a direct submission or where a defendant has elected to wait and invoke immunity in the circuit court, the issue should be raised promptly so that it can be addressed as a threshold motion.

Finally:

> The sole remaining issue is how the trial courts should proceed in determining probable cause. The burden is on the Commonwealth to establish probable cause and it may do so by directing the court's attention to the evidence of record including witness statements, investigative letters prepared by law enforcement officers, photographs and other documents of record. Although Rodgers advocates an evidentiary hearing at which the defendant may counter probable cause with proof "by a preponderance of the evidence" that the force was justified, this concept finds no support in the statute. The legislature did not delineate an evidentiary hearing and the only standard of proof against which a defendant's conduct must be measured is the aforementioned probable cause. We decline to create a hearing right that the statute does not recognize and note that there are several compelling reasons for our

conclusion.

> First, the pretrial evidentiary hearings that are currently conducted, such as suppression hearings, do not involve proof that is the essence of the crime charged but focus instead on issues such as protection of the defendant's right to be free from unreasonable searches and seizures, right to be represented by counsel and right to *Miranda* warnings prior to giving a statement. Similarly, a competency hearing addresses the state of the defendant's mental health and his ability to participate meaningfully in the trial. Neither of these hearings requires proof of the facts surrounding the alleged crime. An evidentiary hearing on immunity, by contrast, would involve the same witnesses and same proof to be adduced at the eventual trial, in essence a mini-trial and thus a process fraught with potential for abuse. Moreover, it would result in one of the elements of the alleged crime (no privilege to act in self-protection) being determined in a bench trial. In RCr 9.26 this Court has evinced its strong preference for jury trials on all elements of a criminal case by providing specifically that even if a defendant waives a jury trial in writing, the court and the Commonwealth must consent to a bench trial. Thus, where probable cause exists in criminal matters the longstanding practice and policy has been to submit those matters to a jury and we find no rational basis for abandoning that stance.

After resolving a number of other issues, Rodger's conviction was affirmed.

NOTE: *The issue of using a co-defendant's statement during a joint trial is a matter for the prosecutor, but officers must be aware of limitations in how they might repeat such statements. Repeating a prohibited statement may cause a mistrial.*

PENAL CODE – CHILD ABUSE

Stone v. Com., 2009 WL 2837391 (Ky. App. 2009)

FACTS: On February 5, 2007, Stone and her son J.A. were at home. Allison, her live-in boyfriend, volunteered to babysit a nephew for his sister, while she was at school. Allison then left, leaving the two children with Stone. When the sister arrived to pick up her son, she later testified that Stone told her she'd been "busting [J.A.'s] ass all morning" and that she'd had Allison come home to "whoop him." The sister also stated that Allison came out of the bedroom with a broken paint stick. The next day, Stone dropped off J.A. with his paternal grandmother. Stone explained that she'd spanked him with a hairbrush and his bottom was bruised, and not to "freak out." The grandmother immediately examined his bottom and was alarmed. She called the police and the child was taken to the ER. Photos were taken. The child stated that Allison had hit him with a stick.

Although Social Services was notified, no investigation was done. J.A. was placed with his mother and maternal grandmother, until Stone got her own place sometime later. The Christian County Sheriff's Office did investigate and Dep. Reed brought charges against both Allison and Stone.

Allison testified at trial as part of a plea agreement and testified in agreement with his sister. He stated that the child was not crying after the spanking, and with that, his sister agreed.

Stone was convicted of Criminal Abuse in the Third Degree and appealed.

ISSUE: Is *risk* of serious physical injury enough to charge with Criminal Abuse?

HOLDING: Yes

DISCUSSION: Stone argued that the prosecution failed to prove the required mental state (mens rea) for the crime – recklessness. The Court agreed that the evidence, that both Stone and Allison had beaten the child, was sufficient. Further, the Court agreed that there was no evidence on record as to whether J.A. suffered serious physical injury (and no evidence of any medical treatment at all). However, Criminal Abuse has as an element not just serious physical injury, but also the *risk* of it, and the Court found it not unreasonable for a jury to find that J.A. was at such risk. (The Court noted that the bruising covered his entire bottom, including the area between his buttocks.)

Stone's conviction was affirmed.

PENAL CODE - DISORDERLY CONDUCT

Windham v. Com., 2009 WL 1884366 (Ky. App. 2009)

FACTS: In Sept., 2003, Windham was convicted on charges of third-degree assault, resisting arrest and disorderly conduct. She appealed.

ISSUE: Is the doorway and front porch public places for Disorderly Conduct purposes?

HOLDING: Yes (but see discussion)

DISCUSSION: Among other issues presented, Windham argued that the jury instructions which indicated her home was a "public place" for purposes of the disorderly conduct charge were incorrect. The Court noted, however, that the conduct which led to her arrest "occurred not only in her home, but also in the doorway, front porch, and front yard outside her residence …." The Court agreed the doorway, as well as the front porch and yard, could all be considered public places under KRS 525.

After resolving a number of other issues, the Court upheld Windham's conviction.

Olbert v. Com., WL 3400287 (Ky. App. 2009)

FACTS: Olbert was arrested for burglarizing his next door neighbor's house, in Kenton County, while she was away. The victim testified that Olbert had agreed to keep her dog overnight but that she did not give him a key to the house. When she returned, she found a window in the garage broken out and blood and fingerprints inside. The burglar had "ransacked" her bedroom and taken money, jewelry and prescription medications." When she next saw Olbert, "he had a fresh cut on his thumb."

Officer Petry (unidentified Kenton County agency) responded. The officer asked Olbert if he would come downtown to have his fingerprints taken and compared. He agreed, but stated he needed to tell his mother where he was going. However, once he went inside the house, he refused to come out and thus wasn't arrested until the police obtained a warrant. He was linked to the burglary through fingerprints and DNA. (He claimed that that evidence was as a result of him assisting the victim in cleaning up glass from a previous break-in.)

Olbert was indicted, convicted and appealed.

ISSUE: Is proof of a housebreaking sufficient to satisfy intent for a burglary charge?

HOLDING: Yes

DISCUSSION: Olbert argued that he was entitled to a jury instruction on trespass. The Court, however, noted that previous courts had "long recognized that, in burglary cases, the "proof of the act [of housebreaking] creates the inference of criminal intent."[2]

Olbert's conviction was affirmed.

PENAL CODE - DOMESTIC ASSAULT

Lisle v. Com., 2009 WL 1811105 (Ky. App. 2009)

FACTS: Lisle was involved in an assault with his live-in girlfriend in Fayette County. Lisle was arrested for fourth-degree assault, third offense, a felony, and a violation of an existing no unlawful contact DVO. He was convicted of both, along with a PFO I and appealed.

ISSUE: Must earlier assault charges proven to involve a qualified domestic victim be used to enhance a later domestic violence assault charge?

HOLDING: Yes

DISCUSSION: Lisle argued that his criminal history did not indicate his previous assault offenses had been with a family member (or girlfriend). The Court agreed that the statute, KRS 508.032, required that such proof of such a prior conviction (specifically, that it involved one of the covered parties) is an essential element to make the offense a felony in Kentucky. In this case, only one of the cases presented clearly indicated it was with a live-in girlfriend, the other was ambiguous.

Lisle's conviction for felony fourth-degree assault was overturned.

PENAL CODE - RECKLESS HOMICIDE

Prater v. Com., 2009 WL 1424022 (Ky. App. 2009)

FACTS: On May 21, 2004, Prater was involved in a one-car wreck that resulted in the death of her son, Jayven. The 2-year-old was not in a child safety seat at the time. Prater tested positive for prescribed medications, including Tramadol, Methadone and Zoloft, but not for alcohol.

Prater was indicted on charges of reckless homicide and convicted. She then appealed.

ISSUE: May an impaired parent be charged with Reckless Homicide for the death of a child not secured in a car seat?

[2] Patterson v. Com., 65 S.W.2d 75 (Ky. App. 1933).

HOLDING: Yes

DISCUSSION: Prater argued that the jury should have been instructed that "failure to place the child in a child restraint system was not to be considered as reckless conduct." Specifically, she argued that since KRS 189.125(3) does not permit that information to be used as contributory negligence in a civil case, that it should "likewise not be admissible in a trial of a criminal case. " The Court looked to Com. v. Mitchell, but unlike the decision in that case, it concluded that it could admit such evidence if there were other factors indicating reckless conduct. In Prater's case, there was evidence that she was "driving too fast, had drugs in her system, and was inattentive."

The Court upheld the admission of the information concerning the safety seat but vacated the judgment due to the improper introduction of other prejudicial evidence.

PENAL CODE - POSSESSION OF A FIREARM BY A CONVICTED FELON

Boyd v. Com., 2009 WL 1256912 (Ky. App. 2009)

FACTS: Boyd was a passenger in a vehicle stopped by Kentucky Vehicle Enforcement officers, in Boone County. During a subsequent vehicle search, a handgun was found in the back seat. All three men were felons, so all three were charged. Boyd pled guilty at arraignment and took responsibility for the weapon. After some discussion and a second hearing, the charges against the other two were dismissed.

Boyd then moved for acquittal at trial and requested the suppression of the statements he'd made earlier. He was convicted and appealed.

ISSUE: Must the prosecution prove that a weapon is operable to charge a felon with its possession?

HOLDING: No (but see discussion)

DISCUSSION: Boyd argued that no proof was introduced concerning the operability of the firearm, but the Court ruled that such proof was not required by the statute. Instead, the condition of the weapon could be pled as an affirmative defense to be raised by the defendant. Further, the Court ruled that his admission to owning the weapon was made in open court, not during plea negotiations, so that information was properly admitted.

Boyd's conviction was affirmed.

PENAL CODE – ROBBERY

Birdsong v. Com., 2009 WL 102849 (Ky. App. 2009)

FACTS: On June 21, 2005, a man "rushed into the [Fifth Third Bank, Lexington]." He slammed open the door and screamed at the tellers to open the drawers. He then grabbed the money, jumped over the counter and fled. Witnesses to the crime described "a lot of noise and pandemonium including the robber knocking over a computer monitor upon jumping over the counter."

Birdsong was arrested and eventually confessed. He was charged with Second-Degree Robbery and eventually convicted. He appealed.

ISSUE: Do loud demands for money constitute force for a Robbery charge?

HOLDING: Yes

DISCUSSION: Birdsong argued that there was no force (under the statute) to justify the charge of robbery. The Court noted that Birdsong's actions, including placing a bandana over his face and his "loud, vocal demands for money constituted a threat of immediate use of physical force upon the clerk."

Birdsong's conviction was affirmed.

PENAL CODE - KIDNAPPING EXEMPTION

Griffith v. Com., 2009 WL 277333 (Ky. App. 2009)

FACTS: On October 19, 2006, in Hardin County, "Griffith repeatedly struck his wife, Michelle, in an attack that spanned more than one hour." The couple had been involved in marital counseling for the preceding year but Griffith had become "increasingly jealous and paranoid." On the night in question, when Michelle had arrived home with the children, Griffith had activated a tape recorder and they began to argue, with Griffith finally forcibly holding her down and lecturing her. The fight escalated to the assault. When Griffith left the room to get a gun, Michelle escaped to a neighbor's home and called the police. Griffith eventually surrendered to the police and the tape recording was introduced as evidence.

Griffith was convicted of Second-Degree Assault and Unlawful Imprisonment. He appealed.

ISSUE: Is holding someone down and lecturing them, prior to an actual assault, sufficient to charge Unlawful Imprisonment as well?

HOLDING: Yes

DISCUSSION: Griffith argued that the Unlawful Imprisonment charge was inappropriate, since the "interference with Michelle's liberty was integral to the assault charge." Under KRS 509.050:

> A person may not be convicted of unlawful imprisonment in the first degree, unlawful imprisonment in the second degree, or kidnapping when his criminal purpose is the commission of an offense defined outside this chapter and his interference with the victim's liberty occurs immediately with and incidental to the commission of that offense, unless the interference exceeds that which is ordinarily incident to commission of the offense which is the objective of his criminal purpose.

To determine if this "kidnapping exemption" exists, the Court developed a "three-prong test to ascertain the applicability of the exemption."

> First, the underlying criminal purpose must be the commission of a crime defined outside of KRS 509. Second, the interference with the victim's liberty must have occurred immediately with or incidental to the commission of the underlying intended crime. Third, the interference

with the victim's liberty must not exceed that which is ordinarily incident to the commission of the underlying crime. All three prongs must be satisfied for the exemption to apply.[3]

Using this test, the Court found that the two crimes were separate and distinct. As such, Griffith's conviction for Unlawful Imprisonment in addition to Assault was affirmed.

PENAL CODE – FLEEING AND EVADING

Carroll v. Com., 2009 WL 160450 (Ky. 2009)

FACTS: Carroll visited the home of Landrum and DeArmond on December 31, 2006. He arrived on foot and borrowed DeArmond's car to get home. Landrum, who was drunk, accompanied him. On the way to Carroll's home, however, Trooper Jewell (KSP) tried to make a traffic stop for speeding. When the trooper attempted the stop, Carroll sped up, and "veered left off the highway onto a narrow, country road." Trooper Jewell later testified that Carroll was driving erratically and that he ultimately lost control and hit a ditch. Carroll fled on foot, leaving Landrum in the passenger seat. Trooper Jewell eventually found Carroll hiding in the woods, some distance from the car, by using a thermal imaging device. Carroll admitted to using methamphetamine and tested positive. At trial, Carroll argued that Landrum was driving and introduced testimony to that effect. However, he was convicted and appealed.

ISSUE: Is driving at a high rate of speed on a narrow country road sufficient to prove a risk to officers and others?

HOLDING: Yes

DISCUSSION: Carroll argued that the evidence was insufficient to support a finding that he was under the influence of methamphetamine at the time, and that as such, there was insufficient evidence of the risk of his fleeing to the trooper or others, including Landrum. The Court, however, noted that all of the evidence indicated he was driving at a high rate of speed on a narrow, country road, and that he disregarded numerous traffic laws. The Court found sufficient evidence to support the assertion that he was impaired.

Carroll's conviction was affirmed.

PENAL CODE – UNLAWFUL USE OF ELECTRONIC MEANS ….

Filzek v. Com., 2009 WL 414462 (Ky. App. 2009)

FACTS: Filzek was charged in Fayette County as a result of "four conversations he had on the internet and telephone with an undercover police detective posing as a fourteen-year-old girl named Joy." Filzek was charged with four counts of violating KRS 510.155. He took a conditional guilty plea and appealed.

ISSUE: Are separate contacts with an underage subject sufficient to charge with multiple counts of Unlawful Use of Electronic Means?

HOLDING: Yes

[3] Wood v. Com., 178 S.W.3d 500 (Ky. 2005)

DISCUSSION: Filzek first argued that the "peace officer provision" of the statute violated the First Amendment because "no actual child was involved in his communications and that the statute punishes mere belief." The Court, however, noted that the U.S. Supreme Court had recently held the "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection."[4] Filzek also argued that four counts constituted double jeopardy "because they were part of an ongoing course of conduct." The court looked to KRS 505.020 and concluded that each contact was a separate and discrete ac, and that each could be prosecuted as a separate act.

Filzek's conditional guilty plea was affirmed.

PENAL CODE – SEXUAL PERFORMANCE BY A MINOR

Little v. Com., 272 S.W.3d 180 (Ky. 2008)

FACTS: During a search of Burke's work locker, an employer found pornographic materials involving children. They contacted the Pikeville PD, and the PD investigated further and did a search (pursuant to a warrant) of Little's home. There, they found a number of other items of child pornography. His wife, Crystal, looked at the material and identified their daughter, K.B., along with Little and Little's daughter and son, C.L. and D.L. She did not recall the children having been at their home, but the background was the Burke living room.

Little was arrested, but nothing was found in his home. The children were in the custody of Little's ex-wife and visitation was now supervised. She knew of only one visit to the Burke home, and after that visit, Little's unsupervised visitations were terminated. The three videotapes found during the search of Burke's home were introduced against Little. The tape, which included amateur splicing, showed the children in their underwear, and included photos of the Burke child with and without underwear under her dress. In some of the video, Burke can be seen touching her stomach and leg, and the child trying to cover her face. There was also video of the two female children in the bath, with male voices in the background. Another video showed Little helping them bathe and focuses on their naked genital regions, and yet another in which Little is tossing the girls up in the air while Burke filmed their bare buttocks and genitalia. In the third video, KB is shown on the couch with a male hand trying to position her and spread her legs apart for the camera, and at one point, she is filmed nude.

Little testified in his own defense, characterizing the video as "family situations." He claimed Crystal Burke was present during the bathtub incident, but had "stepped out." He denied knowing upon what Burke was focusing, and stated he'd never seen the videos. He admitted that bringing the children to the Burke home violated the terms of his visitation rights.

Little was eventually convicted on various counts of using a minor in a sexual performance, and promotion a sexual performance by a minor. He appealed.

ISSUE: Are Using a Minor in a Sexual Performance and Promotion of a Sexual Performance by a Minor two separate charges for double jeopardy considerations?

HOLDING: Yes

[4] U.S. v. Williams, --- U.S. --- (2009)

DISCUSSION: Little argued that the two charges constituted double jeopardy. The Court applied the Blockburger test, which requires that it compare the applicable statutes to determine "whether each provision requires proof of a fact which the other does not."[5]

In this case, although there was an overlap in elements, the Court concluded that Little was prosecuted for multiple, separate offenses and for separate victims. The Court found no double jeopardy claim.

Little also argued that there was no evidence of his intent to sexually exploit the children, and that he could not be held responsible for what Burke filmed. The Court reviewed the specific evidence against Little, and found it "wholly unbelievable that Little would not be aware Burke was filming the child's genital area given the vantage point Burke must have assumed in order to capture the video." The Court found that a reasonable jury could conclude that Little intended his actions. He allowed his daughter to be filmed in the nude, at one point. Finally, Little objected to the introduction of the entire videotape, which included spliced footage of unknown persons. The Court applied KRE 401 and 403, and concluded that the videotapes, in their entirety, were relevant to show that Little was complicit with Burke in the filming, and his intent could be inferred from his actions.

Little's convictions were affirmed.

DOMESTIC VIOLENCE

Faught v. Faught, 2009 WL 1705129 (Ky. App. 2009)

FACTS: David Faught was the subject of an EPO, then a DVO, taken out by his sister-in-law, Gloria Faught, with the allegation being that he "threatened her with physical harm." He did not appear at the DVO hearing, later claiming to have had car trouble. The DVO ordered him to have no contact with his sister-in-law. The following month, he was arrested for allegedly violating the DVO. Faught was granted a rehearing and the previous 3-year no contact order was reduced to 1-year. David Faught then appealed.

ISSUE: Is a sister-in-law a member of a subject's immediate family?

HOLDING: Yes

DISCUSSION: David argued that he was not a member of Gloria's immediate family. However, the Court quickly concluded that KRS 403.720(2) included a sister-in-law (married to Faught's brother) was within the degree of "consanguinity or affinity within the second degree." David also argued that Russell Circuit Court was not the proper venue, because the alleged acts occurred in Pulaski County, but the Court agreed that it was proper to file in the victim's usual county of residence. Finally, Faught argued that Court failed to rule on his request for a return of his personal property, but the Court agreed that he had been told to "prepare a list of items for the sheriff to give Gloria and Charles so the property could be returned."

Faught's conviction was affirmed.

Cissell v. Cissell, 2009 WL 3672835 (Ky. App. 2009)

FACTS: Edward and Alice Cissell divorced in 2007. Following the divorce, Alice moved to Louisville. Alice filed for an EPO in 2007. A DVO was entered against Edward and included the requirement that he not

[5] Blockburger v. U.S., 284 U.S. 299 (1932); Polk v. Com. , 679 S.W.2d 231 (Ky. 1984).

own any firearms during the duration of the order. In 2008, Edward requested a modification of the order to permit him to possess weapons issued by the military. The family court denied it and he appealed.

ISSUE: May harassment/harassing communications be considered "crimes of domestic violence?"

HOLDING: Yes

DISCUSSION: Cissell contended that federal law permitted the family court to exempt him from the ban against possession firearms, and that previous convictions for harassment (against Alice) and harassing communications (against his sister-in-law) did not qualify as crimes of domestic violence. He also apparently pled guilty to several other misdemeanors.

The Court agreed that Cissell "should not have access to firearms" and supported the ban in the DVO.

FORFEITURE

Com. v. Maynard, 2009 WL 2408418 (Ky. App. 2009)

FACTS: On January 4, 2007, police found approximately 24 pounds of marijuana on Maynard's property. It was seized, and he was indicted. But, before he could go to trial, Maynard died. The charges were then dismissed. Prior to his death, the Commonwealth had recorded a forfeiture lien against the real property. Upon Maynard's death, the Commonwealth sought to enforce the lien and sent a copy to Maynard's former attorney. The attorney filed an objection, arguing that since Maynard had not been convicted, the property was not subject to forfeiture.

At the hearing, Maynard's attorney was understood to be representing the estate, and Maynard's heirs were also present. The trial court denied the forfeiture, finding that his heirs were innocent owners of the property. The Commonwealth appealed.

ISSUE: In a post-death forfeiture motion, is it necessary to name the heirs?

HOLDING: Yes

DISCUSSION: Maynard's heirs argued that the Commonwealth had failed to name them in the notice of appeal, and argued that the appeal must be dismissed for that reason. The Commonwealth countered by saying that it named Maynard and that his heirs simply "stepped into his shoes." The Court found little prejudice to the heirs by the Commonwealth's error in failing to name them as a proper party. Everyone involved had been actively involved in the litigation. However, the Court agreed that the Commonwealth's failure to name an indispensable party was fatal to the action.

The Court reminded the Commonwealth as to the proper process to designate such parties in a forfeiture action. Once the lien was dismissed by the trial court, the "heirs became the true an unencumbered owners of the real property," and they became indispensable parties to any further action. The Commonwealth's appeal was dismissed.

Johnson v. Com., 277 S.W.3d 635 (Ky. App. 2009)

FACTS: Johnson was convicted of trafficking in cocaine and the court ordered the forfeiture of a large amount of cash found during the arrest. He appealed the forfeiture.

ISSUE: Is cash found in close proximity to unlawful controlled substances presumed to be subject to forfeiture?

HOLDING: Yes

DISCUSSION: The Court noted that two wallets, one with $4,300 in cash and the other with $3,000, were found in a hole in the box springs in Johnson's bed. A sock in his suitcase held $390. The cocaine was found in his clothing near the bed. The Court looked to KRS 218A.410(j), which provided a rebuttable presumption that all money found in close proximity to controlled substance are connected to the drugs.

Further, in Osborne v. Com., the Court stated:

> On examination of the foregoing statute, it is apparent that any property subject to forfeiture under (j) must be traceable to the exchange or intended violation. This requirement exists without regard to the presumption which appears later in the statute. Without such a requirement, the statute would mandate forfeiture of property which was without any relationship to the criminal act and would be of dubious constitutional validity under Sections 2, 11, 13, 26 and possibly other sections of the Constitution of Kentucky. With such a requirement, however, the General Assembly is entitled to great latitude to create presumptions. Recognizing the difficulty of proof with respect to showing a connection between currency and drug transactions, the General Assembly created a presumption whereby currency found in close proximity to controlled substances was presumed to be forfeitable subject to the right of the owner to rebut the presumption. While the presumption would, at first blush, appear to dispense with the requirement of traceability, we believe the two must be construed harmoniously so as to give effect to the intention of the General Assembly. The Commonwealth may meet its initial burden by producing slight evidence of traceability. Production of such evidence plus proof of close proximity, the weight of which is enhanced by virtue of the presumption, is sufficient to sustain the forfeiture in the absence of clear and convincing evidence to the contrary. In practical application, the Commonwealth must first produce some evidence that the currency or some portion of it had been used or was intended to be used in a drug transaction. Additional proof by the Commonwealth that the currency sought to be forfeited was found in close proximity is sufficient to make a *prima facie* case. Thereafter, the burden is on the claimant to convince the trier of fact that the currency was not being used in the drug trade.[6]

The Court agreed that the money was subject to forfeiture, noting that the denominations (100, 50 and 20 dollar bills) suggested drug trafficking. Johnson introduced evidence that he had received $4,500 from a family member to buy a vehicle. However the Court agreed that Johnson had not "rebutted the presumption by clear and convincing evidence and in ordering the forfeiture of the cash."

The Court upheld the forfeiture order.

[6] 839 S.W.2d 281 (Ky. 1992).

DUI

Little v. Com., 2009 WL 1110336 (Ky.2009)

FACTS: On Aug. 9, 2004, Little collided with a car driven by Sosh, in Meade County. Sosh, her toddler son and another individual in her car were all injured. Little was also injured and transported to the hospital, "but his blood was not drawn until three hours had passed since the accident." The results were .29% at that time. Witnesses agreed that Little had been drinking prior to the wreck but were unable to agree as to how much. Other witnesses also noted his erratic driving. Deputy Robinson (Meade Co. SO) found beer cans both inside and outside the truck. He was, of course, unsure of Robinson's degree of intoxication at the scene.

Little was eventually indicted on numerous charges related to the wreck; He stood trial. He was convicted and appealed.

ISSUE: May blood tests taken three hours after a wreck be introduced in evidence in a KRS 189A.010(b) prosecution?

HOLDING: Yes

DISCUSSION: Little first argued that it was inappropriate to introduce his four prior convictions for DUI, which occurred between 1995 and 1997. The trial court admitted the convictions under KRE 404(b), as "prior bad acts" that indicated "his intent, knowledge, and absence of mistake regarding driving while intoxicated." The Court, however, found that the introduction of the evidence was error, noting that in Com. v. Ramsey, it had held that "previous DUI convictions do not fall within either the exceptions outlined by KRE 404(b) or those recognized by this Court."[7] The Court agreed that the evidence was "unduly prejudicial" and should not have been admitted.

The Court also noted that the injuries sustained by the passenger in Sosh's car were not serious, a bloodied nose, a cut lip and a cut on her knee. Some year later, she suffered another problem with her knee, but the Court noted no connection between that problem and the wreck. The Court agreed, however, that if the problem with her knee had been proven to have been caused by the wreck, it "could qualify as a serious physical injury because it is reoccurring and does affect the use of her right leg." As such, the charge of first-degree assault was not appropriate in this case. The Court did find it was appropriate to charge Little with First-Degree Wanton Endangerment with respect to another car he forced off the road. (The driver was uninjured.) Since the evidence indicated he had been drinking before that occurred, the charge was valid. Finally, the Court agreed it was appropriate to allow the introduction of the blood tests, taken 3 hours after the crash. Little argued that it was error because "KRS 189A.010(2) prohibits the admission of blood tests taken over two hours from the initial arrest to be used to determine blood alcohol levels as evidence for a prosecution under KRS 189A.010(1)(a) or (e)." However, "KRS 189A.010(2) clearly states that blood tests taken after two hours are admissible in prosecutions under KRS 189A.010(1)(b) or (d)." Since the case was proceeding under (b), the admission of the results was not error.

Little's conviction was overturned because of the KRE 404(b) issue.

[7] 920 S.W.2d 526 (Ky. 1996).

Mattingly v. Com., 2009 WL 1098111 (Ky. App. 2009)

FACTS: On Sept. 2, 2007, a KSP trooper spotted Mattingly "driving a golf cart with a mixed drink in her hand" on a private road in Grayson County. She admitted drinking an alcoholic beverage and failed several FSTs. She was arrested and charged with DUI and having an open container of alcohol in a motor vehicle.

She moved to dismiss, arguing that the golf cart was not a motor vehicle under KRS 189A.010 and that it was not operated on a public highway. The trial court denied the motion and she took a conditional guilty plea. She then appealed.

ISSUE: Is a golf cart a motor vehicle for purposes of KRS 189A.010?

HOLDING: Yes

DISCUSSION: Mattingly continued her argument that a golf cart was not a motor vehicle. Since KRS 189A.010 does not give a specific definition for motor vehicle, Mattingly argued that the Court should use the definition under KRS 189.010(19) which indicates a motor vehicle "is a motorized transportation agent used for the purpose of transporting people or property over or upon the public highways of the Commonwealth." Because golf carts were not legally driven on the public roadways at the time, she claimed the definition did not include golf carts.

The Court, however, stated that since the definition in KRS 189 "was for the use of that term as used in that chapter and not necessarily as used in KRS Chapter 189A," it must instead "go to the common usage and approved usage of the term." The golf cart had motors and rubber tires and was being operated on a private road in a subdivision. That road was shared with vehicles and by driving on the road, she was placing others in danger.

The decision of the trial court was affirmed.

Fields v. Com., 2009 WL 875327 (Ky. App. 2009)

FACTS: On Dec. 6, 2006, Nicholasville officers were sent to investigate a disturbance in a local parking lot. They found Fields "yelling, screaming and shouting profanities at other individuals." She was arrested for DUI, resisting arrest and disorderly conduct.

At trial, a witness testified that when she arrived at the restaurant, she saw Fields' SUV in a handicapped parking place. She thought the vehicle was preparing to back out of the space because the "brake lights and back-up lights were illuminated." She waited, but the vehicle did not back up, so she parked. When the witness got out, she could hear the SUV running. Two of the witness's passengers testified to the same information. Officer White (Nicholasville PD) testified that when he arrived, Fields was out of her car and very belligerent. He believed her to be very "extremely intoxicated." As he and Officer Resor arrested her, she struggled and pulled away from him, flailing her arms. Eventually, they got her into custody.

Fields was convicted, and appealed.

ISSUE: Is evidence that a vehicle is running proof that the driver is in physical control of it?

HOLDING: Yes

DISCUSSION: With respect to the DUI, Fields argued that she was not operating or in physical control of her vehicle. She explained that when she used the remote keyless entry to unlock her vehicle that the lights would come on automatically. She claimed she never started the vehicle. The Court looked to the four factors in Wells v. Com.[8] and found that the prosecution had presented sufficient information that the vehicle was, in fact, running, particularly since that feature of the car would have only illuminated the lights for about 40 seconds, a much shorter time than the witnesses claimed. Further, this indicated that she intended to drive the vehicle.

Fields' conviction was affirmed.

Wilson v. Com., 2009 WL 960750 (Ky. App. 2009)

FACTS:: On Aug. 16, 2006, Officer Goodwin (Middlesboro PD) made a traffic stop of Wilson after Wilson backed out of a driveway, squealing and spinning tires. When Officer Goodwin approached, he "smelled alcohol." Wilson failed all but one FST, and took a PBT which indicated the presence of alcohol.

Officers Goodwin and Greene searched the car and found syringes and cocaine residue. Wilson refused blood and urine testing at the hospital. He was indicted on numerous traffic related charges. Eventually Wilson was convicted of most of the charges, inducing DUI. He appealed.

ISSUE: May a PBT be mentioned as a Field Sobriety Test?

HOLDING: Yes

DISCUSSION: During Officer Goodwin's testimony, he described the FST's he performed and also mentioned the PBT. He stated the PBT detected the presence of alcohol, and Wilson objected at that time. The officer was cross-examined using the Standardized Field Sobriety Testing and Reference Guide, which included PBTs.

The Court reviewed the statute, KRS 189A.194, and agreed that testimony concerning the PBT detecting the presence of alcohol was not evidence to prove guilt. The Court found it was not error to admit the mention of the PBT, however, as one of several FSTs. Further, the Court found that the introduction of evidence of cocaine residue was also admissible, as Kentucky subscribes to the "any amount" test, rather than the "usable quantity" approach. Wilson also argued that the officer's comment on his "bruised and scarred" arms was inappropriate, but the count concluded that its introduction was, at best, harmless error.

Wilson's conviction was affirmed.

Litteral v. Com., 282 S.W.3d 331 (Ky.App. 2009)

FACTS: On the day in question, Officer Combs (Lexington PD) arrested Litteral for DUI and took him to the jail. There, he explained Litteral's rights, and Litteral called his sister, an attorney, during the waiting period. "Officer Combs remained in close proximity to Litteral while he was attempting to communicate with his attorney."

Litteral took a conditional guilty plea and appealed.

[8] 709 S.W. 2d 847 (Ky. App. 1986).

ISSUE: Does an arrested DUI subject have a right to confer privately with an attorney prior to taking the Intoxilyzer?

HOLDING: No

DISCUSSION: Litteral argued that the test results should have been excluded because he did not have the opportunity to consult privately with his attorney. The Court reviewed the history of the implied consent law, and concluded that the statutory right "described is very circumscribed" and does not create a right to have counsel present or to consult privately with an attorney - and if the Legislature intended to create such a right, it could easily have done so. (The Court further noted that another statute required that the officer personally observe the subject for 20 minutes.) The Court continued:

> We are convinced that the purpose of this very circumscribed right of access to counsel was to allow independent confirmation of the information conveyed by the law enforcement officer – and then only in a way that does not impact the accuracy of the test itself.

The Court also agreed that inability to actually make contact with an attorney did not relieve the person from an obligation to submit to the test.

Litteral's plea was upheld.

Hoppenjans v. Com., 299 S.W. 3d 290 (Ky. App. 2009)

FACTS: At Hoppenjans' trial for DUI, the arresting officer mentioned that he refused to take a PBT. Hoppenjans made a timely objection and asked for a mistrial, which the trial court denied. The judge did admonish the jury to disregard the testimony, and the court legally presumes that a jury will follow such admonitions. Hoppenjans was convicted of DUI, and appealed to the Circuit Court, which also affirmed. He further appealed.

ISSUE: Is the mention of a PBT improper in trial testimony?

HOLDING: Yes

DISCUSSION: The Court noted that the improper testimony came in during direct examination when the "prosecutor asked the arresting officer to describe the traffic stop of Hoppenjans." The officer described his "performance on various coordination tests," and was them prompted by "what did you do next?" The officer then "discussed the PBT and Hoppenjans's refusal to take the test." The Court concluded that the trial court had no reason to find that the jury would have failed to follow the admonition. However, it noted that the "holding in this matter should not be construed as an approval of the admission of this type of evidence." Kentucky law is clear that such evidence is prohibited[9] and "prosecutors and police officers participating in DUI cases should be fully aware of these rules." Further, the Court noted "this type of error should be easily avoidable with proper preparation of witnesses."

Hoppenjans's conviction was affirmed.

[9] KRS 189A.100(1); KRS 189A.104(2).

ARREST

Shannon v. Com., 2009 WL 3320590 (Ky. App. 2009)

FACTS: On November 21, 2006, Paducah PD officers went to Shannon's home to arrest her daughter. When Shannon answered the door, the officers asked about the daughter and she gave "inconsistent answers." She then shut the door. Unsure as to whether the daughter was there, the officers "repeatedly rang the doorbell and knocked on the door." Shannon "yelled profanities." They told Shannon to calm down and lower her voice, and stop using the profanities, but she continued. The officers then attempted to arrest Shannon. (Apparently at some point, she reopened the door.) As an officer attempted to handcuff her, Shannon ran back inside, followed by the officers. She continued to resist and yell and struck one of the officers in the face. She was ultimately arrested, and indicted, on a variety of charges, including third-degree assault.

Shannon was convicted, and appealed.

ISSUE: May a person be guilty of Disorderly Conduct inside their own home?

HOLDING: Yes

DISCUSSION: Shannon argued that her arrest was illegal. Officer Orazine had testified that "Shannon's yelling and cursing was so loud that it echoed off of nearby homes and caused people in the neighborhood to look and see what was happening." He agreed that the handcuffing and the assault took place inside the home, however. A witness for Shannon indicated that Shannon was not on the porch and that the "incident took place inside Shannon's home." He agreed she was yelling, but testified that he did not believe the yelling could have been heard across the street.

The trial court had ruled that the arrest was lawful "because her unruliness had created a disturbance in the neighborhood, irrespective of whether she was outside or inside the home." The appellate court agreed that once she had committed disorderly conduct, there was "nothing inappropriate in the subsequent pursuit and arrest of Shannon by the officers."

Shannon's conviction was affirmed.

ARREST – ARREST WARRANT

Solomon v. Com., 2009 WL 276755 (Ky. App. 2009)

FACTS: On March 21, 2007, Sgt. Williams (unnamed Campbell County area agency) observed Solomon walking along a county road, apparently hitchhiking. Sgt. Williams told him hitchhiking was illegal and offered him a ride. He asked to see Solomon's ID, which he later explained was because "he wanted to run a background check … for safety purposes before voluntarily giving him a ride." He learned there was an active warrant, so he arrested him and took him to jail. There, he was searched and a contact lens case with cocaine was found. He was then charged with possession of a controlled substance. (He was not charged for hitchhiking.)

Solomon requested suppression and was denied. He then took a conditional guilty plea and appealed.

ISSUE: Does the existence of an active arrest warrant supersede any impropriety for the stop?

HOLDING: Yes

DISCUSSION: Solomon argued that the officer lacked reasonable suspicion to stop him, because "Sgt. Williams mistakenly believed that all hitchhiking is illegal." (In fact, the Court noted, Kentucky law only prohibits standing in the roadway, and that it does not "prohibit soliciting a ride while standing in grass along a roadway." The Court, however, stated that it was "not persuaded that a stop occurred even though Sgt. Williams testified that had Solomon run away or refused to answer his questions," he would have believed a criminal act was occurring. The Court found "no indication that Sgt. Williams intended to arrest or detain Solomon for the violation" he believed was occurring. The Court agreed that the offer was a "gesture that a reasonable person would likely construe as friendly and helpful rather than a restraint of freedom." Finally, the Court held that "regardless of whether a stop occurred, the knowledge that Solomon had an active bench warrant acted as an intervening event that would validate Solomon's arrest."[10] The Court found that such an "intervening act … dispelled any prior wrongdoing or misjudgment" of the officer involved.

Solomon's conditional guilty plea was upheld.

SEARCH & SEIZURE - CONSTRUCTIVE POSSESSION

Miller v. Com., 2009 WL 160370 (Ky. 2009)

FACTS: On June 29, 2004, Trooper Bowles (KSP) was dispatched to the home of Miller and Parker to investigate a strong chemical odor. He tracked the odor to an outbuilding and trash can on the property, and found a "fuel container and several starter fluid cans, both considered precursors of methamphetamine production." Bowles and other troopers approached and knocked, and found a note directing visitors to the side door. The troopers entered an outbuilding and found a "recently active methamphetamine lab." They also found anhydrous ammonia in an inappropriate container, and a "finished cook of methamphetamine." There were also security lights and cameras around the residence. Trooper Bowles went to get a search warrant, and the remaining troopers secured the scene. During that time, a vehicle recognized as possibly being driven by Parker drove by. Troopers made a traffic stop; they discovered that Parker was driving and Miller was a passenger. Parker's keychain included a key to the outbuilding, and the tag for that key had both Parker's and Miller's name and phone number.

Parker and Miller were brought back to the residence and told of the search warrant. Miller questioned why the lights were on at the house. He stated that he left the outbuilding locked most of the time, and that his key to the building had disappeared previously. Inside the house, the troopers found methamphetamine and paraphernalia, television monitors hooked up to the security cameras and a police scanner. They found night vision goggles in the vehicle, as well.

Miller was charged, and ultimately convicted, of possession of the anhydrous in the unapproved container, manufacturing methamphetamine, possession of methamphetamine and possession of paraphernalia. He appealed.

ISSUE: Does having a key to a building constitute constructive possession of the contents of that building?

[10] See Baltimore v. Com., 119 S.W.3d 532 (Ky. App. 2003); Hardy v. Com. , 149 S.W.3d 433 (Ky. App. 2004).

HOLDING: Yes

DISCUSSION: The Court agreed that convictions for manufacturing methamphetamine and possession of methamphetamine constituted double jeopardy, and dismissed the latter. (However, the possession of anhydrous was not double jeopardy when coupled with the manufacturing methamphetamine, under the Blockburger[11] test.) However, the Court agreed that Miller was in constructive possession of the lab, since he had access to a key to that building.

Finally, the Court agreed it was proper to admit the testimony of Trooper Bowles concerning the relevance of the night vision goggles, and how they were connected to the theft of the anhydrous ammonia.

Miller's convictions for everything but the possession of methamphetamine were affirmed.

Cantrell v. Com, 288 S.W.3d 291 (Ky. 2009)

FACTS: On January 27, 2006, the Johnson County SO got a tip that a meth lab was operating in a trailer on property owned by Cantrell's father. The deputies went to the scene. When Deputy Wyatt arrived, he spotted Cantrell and Dalton "climbing out an open window and running away." Both were inadequately dressed for the cold weather and Dalton was shoeless. Deputy Mayes also saw them and both were captured. Both deputies recognized the odor of ammonia on their persons.

Cantrell gave permission to search the trailer. "A strong caustic odor permeated the air around the residence," and as they entered, the deputies "encountered a foggy haze and more of the strong caustic odor which had been detected outside." The Court continued, "in fact, one of the officers began coughing so much because of the fumes that he had to be treated at the local hospital." They later discovered all the chemicals and equipment necessary for the manufacture of methamphetamine. They also discovered another individual, unconscious inside, and a surveillance camera set up on the driveway.

Cantrell was convicted of complicity and appealed.

ISSUE: Does fleeing from a house trailer connect a suspect to that trailer and to everything found inside?

HOLDING: Yes

DISCUSSION: Cantrell argued that the evidence "failed to connect him to the trailer." The Court noted that Cantrell "was climbing out a window of the trailer and attempting to flee when officers arrived on the scene." The Court also noted the pair were "unseasonably dressed when they were apprehended" and that he "led the officers to believe the trailer was his home." The consent form he signed indicated he was "giving them consent to search 'the home of Brent Cantrell'" and his truck was parked at the trailer. In fact, his initial motion to suppress indicated that the trailer was "his home." As such, there was sufficient evidence that he was connected to the trailer.

Cantrell's conviction was affirmed.

[11] Blockburger v. U.S., 284 U.S. 299 (1932)

Taylor v. Com., 2009 WL 1160263 (Ky. App. 2009)

FACTS: On the day in question, a bicycle officer was patrolling through a park when he spotted Taylor sitting at a picnic table. The officer saw Taylor "take something out of his sock and put it by his feet." The officer approached and asked for ID; Taylor "became belligerent." The officer spotted a pipe on the ground near Taylor, and charged him with drug paraphernalia. Since the pipe contained cocaine, a charge of possession was added.

Taylor was convicted and appealed.

ISSUE: Is contraband found near a subject, but in a public place, in constructive possession of that subject?

HOLDING: Yes (depending upon circumstances)

DISCUSION: Taylor argued that the "discovery of contraband in a public location, as opposed to a private place, greatly diminishes the weight of the permissible inference from an individual's close physical proximity to contraband." The Court looked to Maryland v. Pringle[12], and ruled that although Taylor "was in a public place, the crack pipe was subject to his immediate control." There was also "available factual inference that the officer had observed Appellant's actual possession of the pipe immediately before it was dropped to the ground."

Taylor's conviction was affirmed.

SEARCH & SEIZURE – SEARCH WARRANT

Rich v. Com., 2009 WL 484969 (Ky. App. 2009)

FACTS: On September 8, 2008, Sheriff Riddle (Clinton Co. SO) received information from a CI had personally observed Rich and another person bringing cocaine to Rich's residence. The Sheriff (and deputies) "had observed heavy traffic in and out of Rich's mobile home for the past several months." Further, "[v]istors to Rich's residence would stay a few minutes and then leave." The sheriff sought a search warrant on Sept. 8 and it was promptly executed. They found numerous items of drugs and paraphernalia. He moved for suppression which, after a hearing, the trial court denied. Rich was convicted on several charges and appealed.

ISSUE: Is an indication that an informant had given reliable information multiple times sufficient to prove that reliability?

HOLDING: Yes

DISCUSSION: The Court reviewed the video of the suppression hearing, and noted that Sheriff Riddle had "testified that the CI had provided reliable information leading to successfully warrants and arrests four to five times in the last two to three years." The Court agreed that the information (based upon an investigation) was sufficient and upheld the denial of the suppression motion.

Rich's convictions were affirmed

[12] 540 U.S. 366 (2003).

Girton/Bartlett v.Com., 2009 WL 427229 (Ky. 2009)

FACTS: On November 9, 2005 Jiminez was murdered at this home in Louisville. Bartlett and Girton, who had met only a few days before the murder, had just moved into an apartment with Morgan. On the day of the murder, they ended up near Jiminez's apartment, driving a friend's car. Bartlett was driving, and claimed that when they stopped in front of Jiminez's building, Girton got out and entered the building. He could see Girton "tussling" with another man and he heard a shot, followed by Girton running out and getting into the car. Girton claimed that Jiminez had robbed him some weeks before, and that when he spotted him, he "suddenly decided to retaliate." When he confronted Jiminez, he tried to stab Girton, and Girton shot him. However, testimony indicated that Jiminez had only been in the U.S. for some ten days. Testimony conflicted as to what happened with the weapon. When pressed, "each young man admitted that the other, at least, had had robbery in mind." Witnesses led the police to the car, which then led to a search warrant for Morgan's apartment. They found a handgun, ammunition, marijuana and crack cocaine, among other items. Bartlett and Girton were charged with murder. At trial, Girton told an entirely different story, essentially, that he was driving and that Bartlett was the assailant. Girton claimed that since he was a juvenile, it was agreed he would take responsibility, presuming that his punishment would be less severe. However, when he was tried as an adult, he testified that he was not willing to take the risk of a life sentence for something he had not done. (Witnesses at the scene could not positively identify the shooter.)

Ultimately both were convicted of First-Degree Robbery and Second-Degree Manslaughter, along with other charges. Both appealed.

ISSUE: Should a warrant state the time and date of the underlying crime, if applicable?

HOLDING: Yes

DISCUSSION: Both defendants argued that their custodial statements should have been suppressed "on the ground that they derived from an illegal search of Morgan's apartment," and that the warrant "was based on an inadequate showing of probable cause."

The warrant stated, in relevant part, that Harris, the girlfriend from whom they'd obtained the car, said that:

> *… she was at 1523 Oneida [Morgan's apartment] last night and [m]et her friend, "J .R.," also known as James Girton. She stated that James moved into the listed address which is leased to Harrison Morgan. Ms. Harris stated that Mr. Girton and his friend, a black male who goes by "Polo," left in her car to go to the store between 1810 and 1840 hours and they returned at approximately 1910 hours.*

They argued that because the "affidavit fails to state explicitly the date and time of the shooting," it "must be deemed a stale crime, evidence of which was not likely to be found at Morgan's apartment." They also claimed that the "affidavit fails to establish Harris's reliability…." The Court agreed that a "warrant affidavit that fails to include enough temporal information to permit the magistrate to assess its staleness is inadequate as a matter of law."[13] However, the Court noted that it was "true that in her description of the crime the requesting officer omitted the date, a detail that should have been included," but further stated that "[w]arrant applications are often prepared in haste, however, and, as noted above, are to be assessed not according to rigid technicalities but in a practical, common-sense manner taking into account the application as a whole." The

[13] U.S. v. Hython, 443 F.3d 480 (6th Cir. 2006).

combination of the date of the application and Harris's reference to "last night," implied that was when her "car had been seen speeding away from the seen of the crime."

Further, the Court stated:

> Although not a model of clarity, perhaps, the affidavit adequately conveyed to the issuing judge when the crime occurred and permitted him to determine that the officer's information was not stale.

The Court also noted that Harris was not an anonymous informant, but that the officers "knew [her] identity and questioned her in person" and the information she provided was corroborated by witnesses to the crime. Bartlett and Girton also argued that there was no evidence that the shooting took place in the context of a robbery or attempt at theft. The Court, however, concluded that a rational jury could conclude that the "pair's coordinated getaway from the scene that Bartlett and Girton rode through the Arcadia apartments [indicated they were] looking for someone to rob…."

They also argued that the admission of mention of the drugs found during the search was improper. The trial court had "permitted the arresting officers to itemize during their testimony what was seized as part of the description of the arrest," but did not permit them to elaborate on it. The jury had been admonished that the gun was not the murder weapon and Morgan admitted the gun and the cocaine were his. The Court agreed that the admission of the gun and the uncharged drugs (the marijuana) was improper, but found it to be harmless error. Finally, Bartlett complained that a detective's statement that he would tell the prosecutor that he cooperated was an inducement because it made an "improper promise of leniency." The Court, however, noted that it was clear that the "detective promised Bartlett nothing but to tell the prosecutor that he had cooperated," which was proper.[14]

Bartlett's and Girton's convictions were affirmed.

Bunch v. Com., 2009 WL 960784 (Ky. App. 2009)

FACTS: On Nov. 13, 2006, officers executed a search warrant on Scholar's Marshall County home. They discovered a camper inhabited by Bunch and Childress but the warrant did not specifically include the camper. Bunch and Childress, who were apparently outside when the officers arrived, went into the camper, and Det. Mighell knocked on the door. Childress answered and was told there was a warrant for his arrest. While Mighell was talking to Childress, he saw a piece of foil "folded in a manner consistent with the use of methamphetamine." Det. Mighell heard a noise in the bathroom, and ordered the occupant to come out. Bunch did so and Mighell read Miranda to both of them. Both refused consent to search the trailer. Bunch was detained for 9 hours, but no evidence was seized from her. Police got a warrant and seized a number of items from the camper and Childress's automobile.

Bunch was indicted and moved for suppression. She took a conditional guilty plea and appealed.

ISSUE: May a search which is independent of a legally problematic detention still be valid?

HOLDING: Yes

[14] Peak v. Com., 197 S.W.3d 536 (Ky. 2006).

DISCUSSION: The Court agreed that while her "detention might be problematic," that the search was completely independent of her detention. As such, suppression of the evidence found in the camper was admissible and her plea was upheld.

Deaton v. Com., 2009 WL 875317 (Ky. App. 2009)

FACTS: On July 12, 2006, officers of the Northern Kentucky drug strike force and the ATF prepared to execute a search warrant at the Keyhole Lounge in Bromley, Kentucky. Officer Kappes later testified about the briefing and noted he was "stacked first" on the entry team – the first officer into the building. His task was to "make his way directly to the back of the establishment to a door marked 'private.'" When he and his team did so, they found the door locked, and "Kappes kicked the door open and entered the small room." He found Deaton and two other people. When he identified himself, one of the others "tossed a bag of pills across the room."

Deaton was handed back to one of the ATF agents, who searched him and found a small case that he believed contained controlled substances. Deaton was arrested.

Deaton requested suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Is a person found immediately involved in a drug offense subject to a full search under probable cause?

HOLDING: Yes

DISCUSSION: Deaton argued that the "personal search was not authorized by the terms of the search warrant and that the arresting officers did not have probable cause to search him." The Court agreed that a "full, warrantless search of an individual's person must be supported by probable cause."[15] The Court reviewed the facts, and noted that when Kappes entered the room, yelling police, the occupants appeared to be "involved not only in conversation but in a narcotics transaction as well," since one of the subjects threw a container of pills "across the room in reaction to the sudden and unexpected appearance of the law enforcement officers." Based upon Kappes' experience, his belief that there was probable cause to do a full search was appropriate.

Deaton's plea was upheld.

NOTE: *Although the case did not present it in this way, presumably even though the search preceded the formal arrest, the probable cause that supported the search also supported the arrest, prior to the drugs being found on his person.*

Beckam v. Com., 284 S.W.3d 547 (Ky. App. 2009)

FACTS: In Jan., 2007, the owner of a car rental company in Meade County, contacted police concerning Beckam. The owner told Trooper Stout (KSP) that a vehicle rented by Beckam had been returned, after a week, with a "large amount of alleged drug residue, its back seat had been removed and damaged, and the spare tire had been removed." He had then rented another vehicle, kept it 2 days, and returned it again with a large amount of drug residue inside. A field test of the residue indicated positive for marijuana. The trooper took possession of an electronic scale that had been found in one of the vehicles. At the time, Beckam

[15] Ybarra v. Illinois, 444 U.S. 85 (1979); Illinois v. Gates, 462 U.S. 213 (1983); Whisman v. Com., 677 S.W.2d 394 (1984).

had possession of yet another car from the company.Trooper Stout learned that Beckam had a lengthy criminal history involving drugs. He sought a search warrant for Beckam's home, the rented vehicle, Beckam's wife's car, and both Beckam and his wife. The ensuing search resulted in the discovery and seizure of many items.

Beckam was arrested and moved for suppression. When that was denied, he went to trial and was convicted. Beckam then appealed.

ISSUE: Is evidence that a person is involved in drug trafficking sufficient to show a nexus for their home, as well?

HOLDING: Yes

DISCUSSION: The Court agreed that the "conditions of the two rental cars permitted the inference that Beckam might be involved in drug trafficking" and that previous case law also "permitted the inference that evidence of Beckam's drug trafficking might be found at his home." [16]

The Court further agreed that any minor errors made in the affidavit (such was precisely where the scale was found) did not invalidate the warrant.

Beckam's conviction was affirmed.

SEARCH & SEIZURE - STALE WARRANT

Sherrard v. Com., 2009 3321391 (Ky. App. 2009)

FACTS: On April 19, 2007, Harrison County (IN) SD notified the Meade County SD that "two individuals were purchasing items used in the manufacture of methamphetamine." They provided a license plate that was traced to Sherrard. Det. Stout (actually Shout) opened an investigation. He tried to do a trash pull several times, but the trash had not been placed at the curb for pickup. He was finally successful on October 18th. Det. Shout found a number of items consistent with drug use and used the information to get a search warrant. Sherrard was indicted and requested suppression. He was convicted and appealed.

ISSUE: May stale information in a warrant be rehabilitated by the inclusion of more current information?

HOLDING: Yes

DISCUSSION: Sherrard argued that the warrant "lacked probable cause and was based upon an affidavit that included stale information." The Court agreed the tip, standing alone, was stale, but it had been corroborated by a more recent trash pull and a list of the items collected. In Ragland v. Com., the Court had ruled that "otherwise stale information may be rehabilitated if it is corroborated by recently obtained information."[17] The Court agreed it was reasonable for the judge to find "that criminal activity was still occurring based upon the items found in the trash pull."

[16] Moore v. Com., 159 S.W.3d 325 (Ky. 2005).
[17] 191 S.W.3d 569 (Ky. 2006)

Sherrard also argued that the "affidavit failed to provide a nexus between the place to be searched and the evidence sought."[18] The Court noted that in this case, "a relationship between the evidence sought and the place to be searched was established by items from the trash pull which contained Sherrard's name and address."

Sherrard's conviction was affirmed.

Tillman v. Com., 2009 WL 3321207 (Ky. App. 2009)

FACTS: Tillman's home was searched by Lexington police. They found marijuana, hydrocodone, ecstasy and Xanax throughout the house. The hydrocodone was found in large pharmacy bottles. A variety of other items connected to drug trafficking were found. He was indicted and tried. He admitted possession of the pills but claimed they were for his personal use and that of his wife. He was convicted on some of the charges and appealed.

ISSUE: May admittedly stale warrant information be corroborated by more recent information?

HOLDING: Yes

DISCUSSION: Tillman argued that the evidence in the warrant was stale. The Court agreed that the age of the information was important, but also noted that "probable cause may still be found where recent information tends to corroborate the dated information stated in the affidavit."[19] The Court reviewed the affidavit and noted that had the warrant been based solely on the 2006 information included in the affidavit, it would have been "too stale to support the search warrant." However, the officers had done an independent investigation on the day of the search and learned that there was marijuana in the house, which corroborated the earlier information, validating the affidavit.

Tillman further argued that the warrant only permitted the officers to search for marijuana, since that was the only drug mentioned by name. However, the affidavit did note that each time he'd been arrested previously, he'd had drugs in addition to marijuana, and as such, the magistrate was entitled to infer that unlawful amounts of prescription drugs or ecstasy would be discovered, as well. Finally, Tillman argued that since they did not test all the hydrocodone, they couldn't convict him based upon the untested pills. (1,000 of the 3,440 found were tested and all found to be hydrocodone.) The Court noted that he admitted his addiction to hydrocodone and that a proper random selection of the available pills were made. The Court found it proper to admit the untested pills, as well.

Tillman's conviction was affirmed.

SEARCH & SEIZURE - CONSENT

Rivers v. Com., 2009 WL 103273 (Ky. 2009)

FACTS: Rivers was developed as a suspect in a firearms theft, although the informant's details were sketchy. Lexington officers followed up on October 4, 2007, and corroborated some of the information. They did a knock and talk and found Jackson, Rivers' girlfriend, and her mother present. Jackson stated the apartment was hers and that Rivers stayed there occasionally. Officer Gibbons explained why they were there

[18] U.S. v. Carpenter, 360 F.3d 591 (6th Cir. 2004).
[19] Ragland v. Com., 191 S.W.3d 569 (Ky. 2006).

and asked Jackson for consent to search for the guns. She was reluctant, but did consent. The officers found a handgun under the mattress in the bedroom, and Jackson explained that Rivers had purchased the gun from a neighbor. (Officers were able to confirm the purchase later.) They found a small safe under the bed, and Jackson stated that her "boyfriend has some personal use in there" - or "something to that effect." Officer Gibbons asked her if she knew the combination and "she just started typing it in." Inside they found two boxes of ammunition and 37 grams of powder cocaine.

Although testimony conflicted, Officer Gibbons later testified that he had stepped outside and made a call about getting a search warrant for the apartment. He stated that he believed he had probable cause to do so even prior to the visit, but did not seek one because they had gotten consent. Jackson's mother, Carolyn, testified that the officers walked in when the door was opened and that her daughter "did not immediately consent" and that the officers talked to her for some time, getting her "upset and crying." She testified that Sheena (her daughter) had told the officers that they needed to get a search warrant, and that "then they made a call and she assumed they were having a search warrant brought to the house." Her daughter asked her advice about permitting the officers to search, and she advised that if she hadn't seen the guns, she should let them search. She agreed that Sheena Jackson did consent.

The Court upheld the admission of the evidence from the search. Rivers took a conditional guilty plea and appealed.

ISSUE: Does a lessee of an apartment have apparent authority to consent to a search of locked containers inside that apartment?

HOLDING: Yes

DISCUSSION: Rivers argued that the search was "illegal because Sheen's consent was a product of coercion, police lying, and deceptions." He had argued at the trial court that Sheena did not have the authority to consent to the search of his personal property, but did not argue that at the appellate level. However, the Court elected to address the issue, and quoted at length from Com. v. Nourse[20] to find that "Sheena clearly had the authority to give consent for police to search the apartment. She did not limit her consent to a particular area, and her knowledge of the combination for the safe indicated she had common authority over it. (Or at the least, for the officers to believe that she did.) Further, the Court found no reason to question the trial court's decision that the consent was voluntary.

Rivers conditional guilty plea was upheld.

Pike v. Com., 2009 WL 3672925 (Ky. App. 2009)

FACTS: On February 1, 2008, KSP received a tip from KDOT that an employee would be driving a state Transportation vehicle at a specific location. Further, the tipster indicated that the individual would be intoxicated, going to a specific location and would have drugs in a black duffel bag. KSP notified the Garrard County Sheriff's Department and Deputy Addison proceeded to the scene. He found a state truck and observed it commit several traffic offenses. He stopped the truck and found Pike to be driving. Dep. Addison noted the "odor of alcohol and bubble gum." Pike admitted he'd been drinking some beer and that he was going to buy methadone. Pike denied certain parts of the tip, however. Addison asked for consent to search the truck and was denied. The deputy stated he would seek consent from KDOT and Pike retrieved and

[20] 826 S.W.3d 329 (Ky. 1992).

handed over a container of methadone, from a black duffel bag. He was arrested and more drugs and items were found during the search.

Pike was charged, and moved for suppression. It was denied. Pike took a conditional guilty plea and appealed.

ISSUE: Is telling a subject that consent to search would be sought from another lawful party improper coercion?

HOLDING: No

DISCUSSION: The Court found the only issue to be whether Pike "voluntarily abandoned the bottle of methadone" or whether it was "obtained from him by means of improper coercion." Kentucky courts had previously held that "where a motorist is initially stopped for a valid purpose and subsequently gives consent to a search of his vehicle, the voluntariness of his consent is the only issue to consider for purposes of the Fourth Amendment."[21] Pike argued that the "threat" to contact KDOT was coercive, but the Court noted that Addison's statement was correct, he could seek consent from KDOT for the search. (Pike was aware, apparently, that the tip came from a KDOT supervisor.) In Henson v. Com., the Court had held "that the mere stating of matters of fact does not constitute coercion in the objective, legal sense."[22]

The Court upheld the denial of the motion to suppress.

Parks v. Com., 2009 WL 3399880 (Ky. App. 2009)

FACTS: On May 14, 2007, McGehee and Chambers, Muhlenberg County SD special deputies, were assigned to watch anhydrous tanks at a local farm, due to a theft problem. They left that location shortly before 1 a.m. and "observed a truck stopped on a side road next to the highway." They saw two men and knew that this fit the pattern for previous thefts from the tanks. McGehee got out to talk to the men while Chambers checked on the license plate. One of the two men was Parks.

The men stated that their vehicle had broken down on their way to visit a girl in Livermore. They appeared nervous and would not make eye contact. McGehee looked in the vehicle and saw a "hose with a connector valve wrapped in black electrical tape" on the floorboard. He knew this hose suggested anhydrous thefts. He had both men step to the rear and saw a black air tank with no hose in the bed of the truck. He also noted that the "valve … had turned a dark green color" - and again, McGehee knew that indicated the tank had held anhydrous and that such tanks are often painted a dark color to conceal them."

The two men were detained and other officers arrived. He asked Parks for consent to search the truck, but Parks denied it was his truck. He later stated that the truck was his but had been in the shop, and might contain things that "might not belong to him." Deputies Albro and Nantz arrived. The truck was searched, although there was dispute as to whether Parks had given consent. Deputy Nantz, however, indicated the Parks was under arrest at the time. Pseudophedrine pills, lithium batteries tubing and a hose that tested positive for anhydrous ammonia were found.

Parks was indicted for manufacturing. He moved for suppression, contending he did not give consent. The Court denied the motion. He took a conditional guilty plea and appealed.

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[21] Com. v. Erickson, 132 S.W.3d 884 (Ky. App. 2004).
[22] 20 S.W.3d 466 (Ky. 2000).

ISSUE: Does a valid arrest supersede a questionable consent?

HOLDING: Yes

DISCUSSION: The Court agreed that the facts supported the assertion that Parks did give Deputy Albro consent, although, it noted, it would have been better to have Dep. Albro testify to that himself. (Apparently only Deputy McGehee testified.) Parks attempted to "salvage his possession by contending that he was coerced into consenting" because he was detained for an hour and handcuffed and several officers were present. Finding that argument unpreserved before the trial court, the Court found that even if they assumed valid consent was not given, that the police had probable cause to arrest Parks. As such, search incident to arrest applied and the search was valid.

Parks's plea was upheld.

Neeley v. Com., 2009 WL 3878069 (Ky. App. 2009)

FACTS: On January 10, 2008, Lexington PD received information that methamphetamine manufacturing was possibly occurring in a specified hotel room. The informant stated that two people had asked him about getting Sudafed and that one of the individuals had been trying to make multiple purchases of the product. They were able to "lure" one of the suspects from the room. He agreed to the officer accompanying him back to the room. There, Neeley opened the door and the officers saw items they believed indicated manufacturing. Officer Hall got a search warrant and found a lab.

Neely was charged and requested suppression. When that was denied, she took a conditional guilty plea and appealed.

ISSUE: May an officer's observations validate an unproven CI?

HOLDING: Yes

DISCUSSION: Neeley argued that "Officer Hall's affidavit in support of the search warrant was based on unreliable informants, a lack of experience and proper training, and mere speculation." The Court, however, noted that:

> Officer Hall's search warrant affidavit stated that the truck dispatcher provided police with specific information regarding the manufacturing of methamphetamine. Police were able to lure Barber to a public street where he permitted them to follow him back to his hotel room. These types of consensual encounters between police and citizens do not trigger constitutional scrutiny. When Barber obtained access to his room, police observed what they reasonably believed to be a methamphetamine lab. While Neeley contends that the items and substances could have been non-criminal, the trial court properly found that Officer Hall's observations established probable cause of criminal activity.

Further, the Court agreed that "Officer Hall's total observations supported his belief that the hotel room contained evidence of a crime" and that "despite of the lack of information regarding the informant, Officer Hall's personal observations provided probable cause to support the issuance of the search warrant."

The trial court's decision was affirmed.

SEARCH & SEIZURE - APPARENT AUTHORITY

Miles v. Com., 2009 WL 3231378 (Ky. App. 2009)

FACTS: On July 4, 2007, Miles's girlfriend, Due, "went to the Newport Police station and reported that Miles has assaulted her." She also stated that he kept a gun at the residence. Officer Fangman accompanied her back to her home and entered with her. Officer Fangman found Miles sitting at a computer desk, with a scale and marijuana. He smelled marijuana, as well. Miles gave the officer consent to open several lock boxes, where he found more drugs.

Miles was indicted and moved for suppression, which was denied. He was tried, convicted and appealed.

ISSUE: May an officer enter a residence when a person with apparent authority to do so gives consent?

HOLDING: Yes

DISCUSSION: Miles claimed that "Officer Fangman unlawfully entered his residence because Due did not have the authority to invite him." The Court noted that Due told the officer she lived there and "used her key to unlock the door." Miles did not object to their entry, but argued that "Due no longer had common authority because she was in the process of moving out." The Court found it reasonable for the officer to believe "that Due had common authority over the residence and the authority to consent to his entrance." Miles also argued that the marijuana and other items were illegally seized, but the Officer stated they were in plain view. "Under this exception to the warrant requirement, law enforcement officials may seize evidence without a warrant when the initial entry was lawful, the evidence was inadvertently discovered, and the incriminating nature was readily apparent."[23] The Court agreed the seizure was proper. Finally, Miles argued that he didn't give consent to search the locked boxes, arguing that "it is unreasonable to believe that a man would consent to a search of an item containing contraband." However, the Court noted that "although it may seem unwise, it is not uncommon." The Court found the officer's testimony credible and supported the conclusion that Miles did give consent.

Miles's conviction was affirmed.

SEARCH & SEIZURE - REQUEST FOR ID

Caldwell v. Com., 2009 WL 4251141 (Ky. 2009)

FACTS: On April 21, 2006, Officer Canup (Paducah PD) was dispatched to a call of gambling. At the location specified, he found two men walking and Caldwell riding a bike next to them. Officer Canup approached the three in his vehicle (without emergency equipment activated), got out, and asked if they could "hang around a second." He asked if they had been shooting dice, which they denied. He then asked who had the dice, and one of the subjects "displayed dice to him." Officer Canup asked for ID and Caldwell produced a license. (The other two simply identified themselves verbally.) He ran the three for possible warrants, none were present, but Canup was told Caldwell had a "drug history." Canup asked Caldwell if he had any drugs on him, and whether he would consent to a search. Caldwell turned to walk away and dropped

[23] See Com. v. Hatcher, 199 S.W.3d 124 (Ky. 2006).

a joint on the ground. When the officer asked if it was, in fact, a joint, Caldwell attempted to flee. He was captured and arrested. During a search incident of his person, officers found crack cocaine and almost $1500 in cash.

Caldwell was charged, and sought suppression. The trial court denied the request and Caldwell was convicted of several charges. He then appealed.

ISSUE: Is asking for identification (alone) a seizure?

HOLDING: No

DISCUSSION: The Court identified the sole issue as whether Caldwell was seized by Canup's request that he stay at the scene and produce ID. The Court ruled that the first interaction was not a "seizure implicating the Fourth Amendment" as the officer displayed no emergency equipment, was alone, "brandished no weapon, and did not use language indicating that compliance with his request was compulsory." The officer requested, but did not demand, ID, and requests for ID are not a Fourth Amendment seizure.[24] His questions about the dice "did not change the consensual nature of the encounter."[25]

Further, the court noted, the seizure occurred only after Caldwell "began walking away, dropped contraband on the ground, and ran." The Court upheld the denial of the motion to suppress.

SEARCH & SEIZURE – EXIGENT CIRCUMSTANCES

Hollon v. Com., 2009 WL 276528 (Ky. App. 2009)

FACTS: On the day in question, KSP dispatchers "received four separate 911 calls within a short time." The female caller "did not give very much information and was screaming in apparent distress." The dispatchers were able to piece together information suggesting her location, and Trooper Rawlins was sent to investigate. Trooper Rawlins asked Sheriff Dunn for assistance, as he was new to the area, and the sheriff found a likely location that matched the description. They ended up at the Hollon residence. There, they found two men working outside, and one immediately "went behind a small outbuilding, apparently desiring to avoid the officers." Hollon remained outside but refused to give them permission to search. The trooper, however, "proceeded to search the house and surrounding buildings limiting his search to locations where a distressed woman might be found." Inside the house, he found marijuana in plain view. He then obtained a search warrant, and ultimately, KSP found "a sophisticated marijuana cultivation operation and 325 marijuana plants."

Hollon was indicted for cultivating marijuana. He requested suppression but was denied. He took a conditional guilty plea and appealed.

ISSUE: Does an emergency permit an exigent search of a residence?

HOLDING: Yes

DISCUSSION: The Court ruled that the four telephone calls that led the trooper to Hollon's home, which fit the general description given by the distressed caller. (His own statements indicated that the caller might have

[24] I.N.S. v. Delgado, 466 U.S. 210 (1984).
[25] Florida v. Bostick, 501 U.S. 429 (1991); Florida v. Royer, 460 U.S. 491 (1983).

been his girlfriend, who had left the property, but in fact, the distressed woman was later located.) The Court found that the search had not been a pretext, and that they had investigated each house along the suspect road. The troopers properly limited their search to their original reason for being there, waiting for a warrant to search further.

The Court also noted that Todd v. Com. is an exception to the search warrant requirement that occurs "when officers reasonably believe that someone inside a home is in need of immediate assistance."[26] The Court noted that the "facts [that] arose subsequent to the issuance of the warrant … have no bearing on the officers' reasonable belief, at the time of the warrantless search, that they might locate a woman in need of assistance in Hollon's home."

Hollon's conditional plea was affirmed.

SEARCH & SEIZURE - TERRY

Milsap v. Com., 2009 WL 3321016 (Ky. App. 2009)

FACTS: On August 29, 2006, LMPD officers were on detail in Beecher Terrace, a high crime housing project. Officers familiar with the complex were on foot, in plainclothes, but identifiable as officers by badges and green wristbands. At about 2:45 a.m., they spotted Milsap riding a bicycle between the buildings and they did not recognize him as a resident. They saw him spot a marked patrol car and turn away. He had a "deer in the headlights look" when he spotted the officers on foot. Because the area was posted against trespassing, they decided to stop and question him about his presence. He stopped on demand and denied living in the complex. He also agreed he was not visiting anyone. He got off the bicycle on demand and stated, when asked, that he had some "dope" (crack cocaine) and a knife. He was charged with possession of a controlled substance and related offenses.

Milsap moved for suppression and was denied. He was convicted of possession at trial, but acquitted of trespass. He appealed.

ISSUE: May innocent factors, taken together, be considered reasonable suspicion?

HOLDING: Yes

DISCUSSION: Milsap argued that "riding his bicycle in a common area of Beecher Terrace did not constitute criminal trespass and was insufficient to provide reasonable suspicion to justify an investigative stop." The Court, however, noted that he was in a posted no trespassing area and was not recognized as a resident. His evasive behavior upon spotting the cruiser was also critical. "Although any of these factors alone may seem innocent, when taken as a whole, these facts clearly gave the officers reasonable suspicion to believe criminal activity was afoot." The Court upheld the stop.

The Court also addressed an issue related to the chain of custody of the cocaine, since there was, apparently, some confusion as to the handling of the evidence. The Court, however, found the chain of custody was sufficiently proven. Finally, the Court found that the initial questioning took place before he was in custody, and that "merely being told to alight from his bicycle" would not place a reasonable person in the belief that they were in custody. They did not restrain his "freedom of movement to an extent equated with a formal arrest." As such, the officers were not obligated to give him Miranda warnings prior to questioning him.

[26] 716 S.W.2d 242 (Ky. 1986).

Milsap's conviction was upheld.

Bailey v. Com., 2009 WL 276715 (Ky. App. 2009)

FACTS: On February 8, 2006, Officers Heselschwerdt and Final (Louisville Metro PD) were "called to an apartment complex that was located in what was known to be a 'high-crime' area." The apartment owner had given LMPD permission to enforce the no trespassing law on the property. As they arrived, the officers spotted Bailey "sitting in a vehicle that had been backed into a parking space." The engine was running, but the car had "multiple flat tires, and its driver's side window was rolled down even though it was cold outside."

The officers drove around the complex for 15-20 minutes, and returned to find Bailey still in the vehicle. Officer Final parked in front, and approached to see if Bailey "who was watching a DVD" was alright and if he lived at the complex. As the officers approached, Bailey tried to get out, but was ordered back into the vehicle. He told the officers that he did not live in the complex, but was visiting a relative. He was unable to identify which apartment, however. He had no ID, but gave the officers his personal information. Officer Final noted the smell of marijuana from the vehicle. Bailey had no outstanding warrants and the vehicle information was also clear, although the license tag had expired. "While Officer Final was checking the VIN, Officer Heselschwerdt took Bailey to the back of the vehicle and asked him if he could pat Bailey down for weapons in the interest of officer safety." Bailey refused, but he was patted down anyway, and the officer "felt hard rock-like objects in Bailey's" pants pocket. The rocks were confirmed to be crack cocaine that were individually packaged, for a total of 4.5 grams of crack cocaine (in 7 rocks) and less than a gram of powder cocaine. Marijuana was also found. The vehicle was searched and nothing was located.

Bailey was indicted on charges relating to controlled substances. He moved for suppression and was denied. He was convicted on most of the charges and appealed.

ISSUE: Is it a seizure to keep someone from walking away for a few minutes?

HOLDING: Yes

DISCUSSION: Bailey argued that the evidence should have been suppressed as the "fruit of an unconstitutional stop" because the officers lacked reasonable suspicion to detain and search him. The Court noted that although Officer Final's parking of his cruiser in front of Bailey's vehicle would normally be a seizure, that it was not the case in this situation because the vehicle itself was essentially unmovable. However, the Court found that Bailey "was obviously seized when he attempted to get out of the vehicle but was instructed by the police to get back in since he was clearly not free to leave the scene at that time." The Court reviewed the information available to the officers at the moment and agreed it was a close decision, but noted that officers may certainly approach someone and pose a few questions under the circumstances. However, once Officer Final smelled the marijuana, he then "had probable cause to search Bailey on grounds independent from those relating to the original basis for the stop."[27] The "intervening circumstance was sufficient to dissipate any 'taint' that might have been caused by prior unlawful conduct on the part of the police."[28]

Bailey also argued that Det. Seelye's testimony, "concerning the criminal practices of drug dealers and traffickers" was improper. The Court, however, agreed that the detective easily qualified as an expert in drug trafficking, based upon his training and experience.

[27] See Dunn v. Com., 199 S.W.3d 775 (Ky. App. 2006).
[28] Wilson v. Com., 37 S.W.3d 745 (Ky. 2001).

After addressing several other issues, Bailey's conviction was affirmed.

Thomas v. Com., 2009 WL 1348875 (Ky. App. 2009)

FACTS: On Jan. 2, 2006, Officers Casper, Campbell and Green (Louisville Metro PD) were working on a special detail in the Park Hill area. They set up a position so they could watch what was occurring in the courtyard, known as "the chute." It was later "uncontroverted that the area was dimly lit and the officers could not see exactly what was taking place in the courtyard from their initial vantage point." They did see Thomas standing in the courtyard, two men approach him, and then leave. They did not see any exchange take place and could not tell if there had been any conversation.

The officers approached Thomas, and asked for ID to verify his address, since that area was posted against trespassing. Thomas had no ID, but agreed to a frisk. However, when the officers started to do so, Thomas bolted. The officers followed, tackling him. They handcuffed Thomas and searched him, finding 24 pieces of crack cocaine. Officer Casper later testified that "he recalled Thomas saying that he ran from them because he believed there was a bench warrant for his arrest," but Thomas was mistaken. Casper believed that statement was made "while they were still on the ground." Thomas also allegedly stated that he would "kick [the officer's] a**" if he wasn't restrained. Thomas was charged with criminal mischief for tearing Officer Campbell's pants. Thomas gave a different recitation of the facts, and claimed he ran when he was grabbed and pushed against a fence. The trial court, however, "found that the credibility of the officers outweighed that of Thomas as to the sequence of events that occurred that evening."

Thomas was charged with trafficking and related offenses. He requested suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Is running when confronted by the police reasonable suspicion to continue a detention?

HOLDING: Yes

DISCUSSION: The court found the nature of the area and the behavior of the individuals on a winter night led to a reasonable suspicion that crime "might be afoot." The Court agreed that the officers had sufficient reasonable suspicion to stop him, and Thomas's flight exacerbated the suspicions. The Court agreed that Thomas was seized and was "not free to leave the scene once he could not show the officers that he was in the neighborhood legitimately." The Court found that requesting ID was appropriate, under the circumstances, and that the frisk was also justified. Further, when Thomas made the decision to run, it "changed the initial Terry stop into a situation where the officers had probable cause to search his person and formally arrest him even absent the discovery of the torn pants that led to the criminal mischief charge."[29] The nature of what was found in his pockets was "immediately apparent" and justified a further search, which revealed the crack cocaine. Finally, Thomas argued that Officer Casper, the only officer to testify, was a new officer, lacking the experience needed for him to make such judgments. However, the Court found that there was no indication that Officers Campbell and Green "were similarly inexperienced," and "Officer's Casper's relative inexperience was mitigated by the other officers who were also present."

The Court affirmed the denial of the motion to suppress, and affirmed his plea.

[29] Illinois v. Wardlow, 528 U.S. 119 (2000).

Martin v. Com., 2009 WL 1811532 (Ky. App. 2009)

FACTS: Lt. Weathers (Lexington PD) was patrolling in plainclothes when he noticed men trying to "flag him down." He suspected drug activity so he called Det. Smoot and other narcotics officers to investigate. Det. Smoot found 7 people at the location. He noticed Martin, specifically, when he tried to "shove something in his pocket." Martin ran when Det. Smoot tried to stop him. Smoot caught him, and Martin threw away some objects. Martin was arrested for fleeing and evading and given Miranda. Smoot searched Martin and found a piece of paper "he believed to be a drug-debt list" and $5321 in cash. He also found 3 grams of crack cocaine, 9.6 grams of powder cocaine and a set of digital scales in the area where he'd seen Martin throw items. Martin gave consent to search his vehicle and the officers found $18,000 in cash hidden in a black shaving kit. Martin admitted the money was "drug money" and named his supplier. He offered to testify in exchange for leniency.

Martin later moved for suppression, but was denied. He was convicted of fleeing and evading, as well as trafficking, and related charges. He then appealed.

ISSUE: Is fleeing from an officer who is trying to talk create reasonable suspicion sufficient for a Terry stop?

HOLDING: Yes

DISCUSSION: The Court reviewed the circumstances, and whether Smoot had reasonable suspicion to engage in a Terry interaction with Martin. The Court agreed that Smoot made "reasonable inferences" about what Martin was doing, and that "Martin instantly created reasonable suspicion justifying a Terry stop upon taking flight."[30]

Martin's conviction was affirmed.

Tillman v. Com., 2009 WL 1424017 (Ky. App. 2009)

FACTS: On July 6, 2006, a Lexington officer spotted Tillman riding a bicycle. He knew that Tillman had outstanding warrants and believed Tillman was trying to evade him. He eventually apprehended him, and advised Tillman "that he was not under arrest, but was being detained while the officer confirmed the existence of the warrants." When the officer did confirm them, he arrested Tillman. He searched and found 4 grams of crack cocaine, and Tillman was charged with trafficking, as well.

Tillman moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Is belief of the existence outstanding warrants sufficient to support a Terry stop?

HOLDING: Yes

DISCUSSION: Tillman argued the stop was unlawful because the officer was "out to get him," and that he was stopped solely because of the officer's animosity towards him. He noted that he was stopped before the officer verified the warrants.

The Court quickly disagreed and affirmed Tillman's plea.

[30] Id.

Clay v. Com., 2009 WL 3047575 (Ky. App. 2009)

FACTS: On July 20, 2007, Officer Kornrumpf (Lexington PD) noticed a woman he believed to be loitering for the purpose of prostitution. He was tied up on another call at the time. A little later (actually early the next morning), he spotted a vehicle being approached by Clay and two women, one of whom was the person he'd seen earlier. As he passed, he saw one of the women being "helped into the back seat by Clay." He saw the other female talking to another man, later determined to be the driver of the vehicle, at the rear of the vehicle. Kornrumpf stopped and turned on his emergency lights for safety. He asked all four to come to the rear of the vehicle, but one of the men (the driver) fled. Clay handed over his wallet, with ID, but would not make eye contact and kept looking back over his shoulder. Kornrumpf told Clay he was going to pat him down, but Clay refused to be searched "unless there were charges placed against him." Kornrumpf called for backup and asked Clay to place his hands on his head. Clay did, but then fled, followed by the officer. "While Clay was running, he did not swing his arms at his sides, but rather he kept his hands in front of his waistband." Kornrumpf observed him "making a throwing motion toward a residence." Clay caught his hand on a fence and was apprehended.

Clay was arrested and searched. The officers found small amounts of crack cocaine and marijuana. A gun was found in the area where Clay was seen to be tossing something, but no physical evidence linked him to it. He was charged with a variety of offenses and moved for suppression. When that was denied, he stood trial and was ultimately only convicted of trafficking and several misdemeanor offenses. Clay appealed the felony conviction.

ISSUE: May the flight of another person in a group be used to justify a Terry detention?

HOLDING: Yes

DISCUSSION: Clay argued that Kornrumpf lacked sufficient cause to "stop" him, but the Court noted that another member of Clay's party had abruptly fled the scene and refused to come back. "When considering the totality of the circumstances, the flight of other individuals is one of many factors that, when taken together, may give an officer reasonable suspicion for a brief detention."[31] Further, the details provided to the Court, the nature of that area of town, the specific actions taken by the women, along with other small factors, were collectively sufficient to support the challenged interaction. Clay's nervousness and baggy clothing were enough to justify a frisk, as well, and was to "allow an officer to pursue an investigation without fear of violence."

The Court agreed that Kornrumpf had reasonable suspicion to frisk Clay and upheld his conviction.

Owens v. Com., 291 S.W.3d 704 (Ky.,2009)

NOTE: *This case was remanded back to Kentucky for consideration in light of the recent U.S. Supreme Court decision in Arizona v. Gant.*[32]

FACTS: Owens was the passenger in a vehicle lawfully stopped by police. The driver was arrested and Owens was frisked, although the officer had no "independent suspicion" that he was guilty of any criminal conduct. The initial decision had ruled that the "automatic companion rule" demanded, for both officer safety

[31] Fletcher v. Com., 182 S.W.3d 556 (Ky. App. 2005).
[32] 129 S.Ct. 1710 (2009)

and public safety, that the officer had discretion to do a frisk under the circumstances presented. During the frisk, Owens apparently started removing items from his pockets and a baggie containing marijuana and some pills fell out. (Owens claimed the officer reached into his pocket to remove cash and that the baggie didn't belong to him.) Owens was charged and convicted. He had originally filed an unsuccessful appeal.

ISSUE: Does finding a crack pipe on an arrested subject's person permit the officer to search the vehicle in which that subject is arrested?

HOLDING: Yes

DISCUSSION: The Court was tasked with looking at the case from the point of view of Gant. The Court stated that:

> This narrowing of the automobile search requirement will undoubtedly affect the propriety of the automobile searches incident to arrest in a great number of cases, but this case is not one of them.

The driver was originally arrested for having a suspended OL. The search of his person incident to that arrest revealed a crack pipe, as such, it was reasonable to believe the vehicle might contain evidence of the offense which gave rise to the arrest. That made the search of the vehicle permissible under Gant.

The Court further noted that:

> And an officer has the authority to order a passenger to exit a vehicle pending completion of a minor traffic stop. So it logically follows that an officer may order a passenger to exit a vehicle while that vehicle is searched incident to the lawful arrest of the driver. It appears that every important action taken up to the point where Owens was frisked was constitutionally permissible.

This made the crux of the case whether the passenger could be frisked when the driver was arrest for drug possession.

The Court continued:

> Two schools of thought have emerged around this subject. One, known as the automatic companion rule, holds that "[a] companions of the arrestee within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory 'pat-down' reasonably necessary to give assurance that they are unarmed."[33] Numerous state and federal courts have either expressly adopted the automatic companion rule or have issued decisions that seem to follow its contours.[34] The other school of thought,

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[33] U.S. v. Berryhill, 445 F.2d 1189, 1193 (9th Cir. 1971) .

[34] See, e.g., U.S. v. Simmons, 567 F.2d 314, 319 (7th Cir. 1977) (holding that the automatic companion rule as expressed in Berryhill was insufficient to justify a full-blown search of an arrestee's companion, but the rationale "may be sufficient where a search is limited to a `pat down. . . . '"); U.S. v . Poms, 484 F.2d 919, 922 (4th Cir. 1973) (voicing agreement with Berryhill) ; State v. Clevidence, 736 P.2d 379, 382 (Ariz.Ct.App. 1987) (citing Berryhill with approval for proposition that "[t]he right to a limited search for weapons extends to a suspected criminal's companions at the time of arrest.") ; People v. Myers , 616 N.E.2d 633, 636 (Ill.App .Ct. 1993) (citing Berryhill with approval and holding that "[w]hile a police officer may not search a person merely because he is with someone who has been arrested, the officer may conduct a pat-down of the arrested person's companions to protect himself or others."); State v . Moncrief, 431 N.E.2d 336, 342 (Ohio Ct.App. 1980) (citing Berryhill with approval) ; Lewis v. U.S., 399 A.2d 559,

also used by several courts, is the totality of the circumstances rule, in which the propriety of the frisk is determined considering the totality of the circumstances.[35] Some courts that have rejected the automatic companion rule appear to believe that it improperly creates a guilt-by-association scenario and obliterates the requirement that an officer have a particularized, reasonable, articulable suspicion that a person is engaging in criminal activity or is dangerous before subjecting that person to a frisk.[36] Legal scholars have also entered the debate.[37]

After much discussion, the Court concluded that in this case, it was appropriate for the officer to frisk Owens. It stated that the "adoption of the automatic companion rule provides needed bright line guidance to the bench, bar, law enforcement community, and citizens across the Commonwealth as to what is constitutionally permissible in cases such as the one at hand."

The Court upheld Owens' conviction.

NOTE: *Notably, although the Court quoted extensively from other jurisdictions on the matter, it did not address the decision made recently by the Sixth Circuit, which is the federal court of precedent for Kentucky. The Court ruled in U.S. v. Wilson, 506 F.3rd 488 (6th Cir. 2007) that it does not recognize the "automatic companion" rule. Although the stated intent of the Kentucky Supreme Court was to create a "bright-line rule" for Kentucky officers in such cases, it has created, instead, confusion. As such, although a Kentucky officer is now permitted under Kentucky state case law to perform such a search in Kentucky, should the case end up in the federal court, instead, the search may be ruled invalid and evidence found during that search will likely be suppressed.*

SEARCH & SEIZURE - ROADBLOCK

Rassman v. Com., 2009 WL 722721 (Ky. App. 2009)

FACTS: On Dec. 21, 2004, Rassman was arrested for DUI as a result of a KSP roadblock in Carroll County. He moved for suppression, arguing that the roadblock was unconstitutional, but the trial court denied him. He took a conditional guilty plea and appealed.

ISSUE: Should an officer be aware of their agency's guidelines for roadblocks?

HOLDING: Yes

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562 (D.C. 1979) (citing Berr Lhill with approval) . Perry v. State, 927 P.2d 1158, 1163-64 (Wyo. 1996) (citing Berryhill with approval and adopting automatic companion rule) .

[35] See, e.g., U.S. v. Bell, 762 F.2d 495, 499 (6th Cir. 1985) (rejecting adoption of automatic companion rule) ; Eldridge v. State , 848 P.2d 834, 837-38 (Alaska Ct.App . 1993) (same) ; Commonwealth v. N , 649 N.E .2d 157, 158 (Mass. 1995) (same) ; State v. Eggersgluess, 483 N.W.2d 94, 98 (Minn.Ct.App . 1992) ; U.S. v. Flett, 806 F.2d 823, 827 (8th Cir. 1986) (same) . We appear to have utilized the totality of the circumstances test in regards to judging the propriety of Terry stops . See, e.g., Priddy v. Commonwealth, 184 S.W.3d 501, 511 (Ky. 2005), cert. denied, 549 U.S . 980 (2006) . However, we have not directly opined on the merits, or lack thereof, of the automatic companion rule.

[36] See, e.g., Eldridge , 848 P.2d at 838 ; Ng, 649 N.E.2d at 157.

[37] See Kristi Michelle Bellamy, The "Automatic Companion" Rule andIts Unconstitutional Application to the Frisk of Car Passengers, 27 Am.J.Crim.L. 21 7 (2000) ; David E . Edwards, Suzette M. Nanovic, Francis M. O'Connell 8s Laura A. Yustak, Case Comment, Criminal Law- United States u. Bell: Rejecting Guilt By Association in Search and Seizure Cases, 61 Notre Dame L. Rev. 258 (1986) . John . J. O'Shea, The Automatic Companion Rule: A Bright Line Standard for the Terry Frisk of an Arrestee's Companion, 62 Notre Dame L. Rev. 751 (1987) .

DISCUSSION: Rassman's first argument was "that the arresting officer failed to comply with the systematic plan established by the KSP[38] for roadblocks," since that trooper "did not have any knowledge of whether media announcements were made prior to the roadblock, did not know "which officer was in charge of the roadblock" and "whether or not all cars were stopped." He also "was unable to articulate the relation of the roadblock to public safety or traffic violations problems at the roadblock's location." The Court, however, concluded failure to "comply with technical precision to each roadblock guideline is not fatal to the constitutionality of the roadblock." The Court noted that Rassman's assertions were taken out of context from the transcript, and that in fact, the trooper did provide enough detail to confirm that the roadblock was undertaken with the approval of KSP supervisors.

Rassman's conditional guilty plea was upheld.

Kilburn v. Com.. 2009 WL 484981 (Ky. App. 2009)

FACTS: On September 10, 2005, the Perry County Sheriff's Office set up a traffic checkpoint. It was "intended primarily to be a sobriety checkpoint." Initially, Deputy Sheriffs Sparkman and Smith were present and Deputy Miller was to arrive later. Sheriff Wooton had approved the checkpoint earlier that day. Kilburn was one of the first stops, made when the deputies were stopping every car. They learned he was driving on a suspended OL and he was arrested. His vehicle was searched incident to the arrest, and they found drugs, a concealed handgun and a throwing knife. The Perry County Sheriff's Office had specific guidelines for such checkpoints, including a list of 26 pre-designated locations. The checkpoint location at issue was not one of the locations listed, however.

Kilburn was indicated for trafficking, carrying a concealed weapon and promoting contraband. He moved for suppression, arguing the checkpoint was illegal. That was denied, the Court finding the checkpoint to be lawful. Kilburn took a conditional guilty plea and appealed.

ISSUE: Is a roadblock location approved in advance by a commanding officer appropriate?

HOLDING: Yes

DISCUSSION: Kilburn argued that by not following its own procedures, the Sheriff's Office violated his constitutional rights. The Court looked to Buchanon[39] for guidance and found that the location of the checkpoint, approved in advance by the Sheriff, was proper.

Kilburn's conditional guilty plea was affirmed.

Bauder v. Com., 299 S.W.3d 588 (Ky. 2009)

FACTS: On December 26, 2005, at about 11 p.m., Bauder was stopped by Trooper Gibson for DUI, in Parksville. KSP had set up a roadblock, but had placed "no markings or signs to notify the public in advance of the roadblock." As Bauder approached, he "came to an abrupt stop within one hundred feet of the checkpoint and made a turn onto" a side road. He used that road to circumvent the roadblock, as the road eventually reconnected with the main road. Trooper Gibson followed Bauder and stopped him. He smelled alcohol and noted that Bauder appeared to be intoxicated, but did not identify any other traffic offenses prior to the stop. He agreed he stopped Bauder solely because he avoided the roadblock. Trooper Gibson later

[38] General Order OM-E-4.
[39] Com. v. Buchanon, 122 S.W. 3d 565 (Ky. 2003).

testified that he found that a driver "turning away from a roadblock" is "generally indicative of the operator of that vehicle either driving while intoxicated or driving on a suspended license."

Bauder moved for suppression, which the trial court denied. Bauder took a conditional guilty plea to DUI and appealed.

ISSUE: Is the coming to an abrupt stop before reaching a roadblock sufficient reason to make a traffic stop?

HOLDING: Yes (but see discussion)

DISCUSSION: Bauder argued that the troopers had no "articulable and reasonable suspicion" that he had "violated the law prior to the stop." The Court couched the stop as investigatory, and compared it to the one done in Steinbeck v. Com.[40] In both cases, the sole reason for the stop was the officer's belief that the individual was attempting to avoid the roadblock. The Court stated it would "wait for another day to determine if the act of making a turn around itself raises a specific and articulable fact sufficient to give rise to reasonable suspicion." The Court applied the "totality of the circumstances" approach and noted that "officers may draw on their own experience and specialized training to make inferences from, and deductions about, the cumulative information available to them that might well elude an untrained person."[41] The split second decisions made by officers must be seen "through the prism of each officer's own training and experience." The Court agreed "there are a multitude of reasons why a driver may avoid a police roadblock, many of which may be completely innocent."

Under the situation as related by the officer, Bauder "came to an 'abrupt' stop" shortly before the roadblock, and then turned onto a side road. He could see the roadblock, and would have observed there was no line leading to the roadblock, so any delay would have been minimal.

The Court upheld Bauder's plea.

SEARCH & SEIZURE - VEHICLE STOP

Arnold v. Com., 2009 WL 2475354 (Ky. App. 2009)

FACTS: On Sept. 28, 2006, Officer McChesney (Probation & Patrol) and Officer Helbig (Bowling Green PD) made a home visit to Elliott. They found a "large amount of cash and cocaine in the residence." Elliott offered to make drug buys in exchange for going to jail. A recording device was attached to Elliott's cell phone. Elliot made a call to Arnold and arranged to buy cocaine. Arnold gave a vehicle description and they agreed to meet in Elliott's apartment parking lot for the transaction. Further phone calls changed the location to a nearby lot. Arnold arrived; he was promptly stopped and handcuffed. A drug dog alerted to the car, cocaine was found and Arnold was formally arrested. He was subsequently indicted for trafficking. Arnold moved for suppression and was denied.

Arnold was convicted and appealed.

ISSUE: Is Gant implicated when a drug offense is the basis for an arrest?

[40] 862 S.W.2d 912 (Ky. App. 1993).
[41] U.S. v. Arvizu, 534 U.S. 266 (2002).

HOLDING: No

DISCUSSION: Arnold first argued that Elliot was not a "sufficiently reliable informant" to support the search of the car. The Court, however, noted that the police did not rely totally on Elliot's statement, but in fact, relied upon Arnold's own statements over the phone. The Court agreed that there was sufficient information to support reasonable suspicion, which was all that was needed for the initial detention. Further, the Court agreed that a "warrantless search of an automobile is justified if there is probable cause to believe criminal activity is afoot because an automobile is inherently mobile and there is a lessened expectation of privacy in an automobile."

Of note, because Gant was decided during the pendency of the appeal, the Court asked for supplemental briefs on that issue. However, ultimately, the Court decided that Gant had no application to the case, noting that the "police were justified in searching Arnold's vehicle because it was reasonable for the police to believe the vehicle contained cocaine, 'evidence of the offense of arrest.'" Arnold also argued it was improper to allow the recording of the telephone conversations to be played for the jury. Officer McChesney had properly identified the conversation, providing a foundation for it. Arnold further complained that the conversation contained hearsay, but the "Commonwealth did not offer the recording to establish that Arnold was a participant in the conversation, what the price of the cocaine was, or any of the other specific facts discussed by Arnold and Elliot." The Court agreed it was admissible.

Arnold's conviction was affirmed.

McCloud v. Com., 286 S.W.3d 780 (Ky. 2009)

FACTS: On the day in question, Officer Royse (along with others from the Louisville Metro PD) was doing surveillance from an unmarked van when he spotted a "Ford Bronco pull into a parking space near them." A female from that van got out, made a payphone call, got back into the Bronco, and then again emerged to make another call. Shortly thereafter, a red Grand Prix arrived and parked between the van and the Bronco. Royse recognized the vehicle, as its owner had been arrested previously, but the owner wasn't in the vehicle. The female got back out of the Bronco and went to the passenger side of the Grand Prix.

Royse spotted the Grand Prix driver holding what appeared to be a chunk of crack cocaine, so he pulled the van to block the two other vehicles. Royse ordered the driver, McCloud, out of the vehicle. Royse saw what he believed to be another piece of crack fall from McCloud's waist area, so he arrested McCloud and gave him Miranda warnings. Royse searched McCloud, finding more crack cocaine. Royse then searched the Grand Prix, and found a loaded handgun, cocaine and marijuana, the latter being in "ironically, a duffle bag bearing an anti-drug slogan." McCloud agreed the bag was his. Royse found a digital scale and $6,450 (in a "personal safe") in the car, and McCloud also agreed, upon being asked, that they belonged to him.

McCloud was indicted on various drug and weapons charges. (He was a convicted felon.) McCloud moved to suppress and was denied. He was convicted on most of the charges. (The carrying of the weapon by a convicted felon was severed from the rest of the charges.) McCloud appealed.

ISSUE: Is the witnessing by an experienced officer of a drug transaction sufficient to make a vehicle stop?

HOLDING: Yes

DISCUSSION: The Court reviewed the findings regarding the suppression motions. First, the Court agreed that Arizona v. Gant[42] did not affect the finding in the case. The Court stated that it was "reasonable for Royse to believe that McCloud's vehicle contained evidence of the offense of arrest," so if his arrest was lawful, so was the vehicle search. The Court agreed that Royse, "who was experienced in narcotics recognition and interdiction, observed McCloud holding what Royse believed, based upon his training and experience, to be crack cocaine." As such, Royse had probable cause for the arrest, even though he did not see a specific transaction take place. The later searches (of McCloud's person and the Grand Prix) "flowed naturally and permissibly from the probable cause-supported arrest of McCloud."

The Court also rejected his "Miranda-based argument regarding the statements he made concerning his ownership of the incriminating safe and duffle bag found in the Grand Prix." Royse gave McCloud the standard warnings "from a card Royse had in his possession." Royse did not invoke his right to silence or to counsel. McCloud argued that "there was an insufficient record to show that he was informed of his full panoply of Miranda rights and had knowingly chosen to waive them." The Court upheld the denial of the suppression of the searches.

The Court agreed that "[p]erhaps it would have been better practice for the Commonwealth to ask Royse the specific language he used in informing McCloud of his constitutional rights." However, the Court continued, the circumstances inferred the McCloud was properly informed and waived his rights, and the Court affirmed that his statements were properly admitted. Finally, the Court agreed that Det. Bowling's testimony regarding elements of the drug trade was also proper, as he was "unquestionably an experienced, qualified law enforcement officer." Further, the Court agreed that his "type of testimony" was representative of the type of testimony for which a Daubert[43] hearing was not necessary. As such, the trial court did not err "when it permitted Bowling to render his opinions without first holding a formal Daubert hearing.

McCloud's convictions were affirmed.

INTERROGATION

Flick v. Com., 2009 WL 1451923 (Ky. 2009)

FACTS: On May 20, 2005, Flick allegedly shot and killed Wittich in Lexington. Flick was still there when two other men arrived and they subdued him and held him for police. As he was injured in the fight, Flick was taken to the hospital and examined. Officer Shirley (Lexington PD) accompanied Flick and gave him Miranda warnings when they arrived. Flick agreed that he understood and Officer Shirley asked basic booking information questions, which Flick answered. Det. Brotherton arrived and talked to Flick; he "was able to develop an elaborate kidnapping story." When the detective told Flick he didn't believe his story, Flick invoked his right to remain silent. Brotherton honored that, immediately ceasing the interview. Flick was then transferred to jail. The next morning Det. Brotherton went to the jail. After a few questions, Flick invoked his right to counsel but continued to speak a bit more.

Flick was charged with murder and related offenses. Flick moved to suppress the statements he made, but the Court denied it. Ultimately he was convicted and appealed.

ISSUE: Are statements made while undergoing medical treatment for non-serious injuries voluntary?

[42] 129 S.Ct. --- (2009)
[43] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

HOLDING: Yes

DISCUSSION: Flick argued that his statements at the hospital were not made voluntarily because he was being treated at the hospital. The Court, however, noted that his injuries were not severe, which set it apart from prior cases cited by Flick in support of his position. With respect to the statements at the detention center, the Court agreed that Det. Brotherton had, as required, "scrupulously honored" Flick's request to remain silent.[44]

The Court reviewed the factors as outlined by Mosley:

> First, he was initially advised of his rights at the hospital, and orally acknowledged those rights Second, when Appellant informed Detective Brotherton that he no longer wanted to talk to him, Brotherton did not question Appellant further, nor did he pressure him to change his mind. Third, the amount of time which lapsed between Appellant's refusal to talk at the hospital and when he was questioned at the detention center was far more than a short lapse of time. Lastly, there is no evidence that Detective Brotherton had coerced Appellant into talking with him at the detention center.

The Court upheld the trial court's decision and Flick's conviction.

Coleman v. Com., 2009 WL 1110314 (Ky. 2009)

FACTS: In mid-July, 2006, Wortham insulted and threatened Coleman's mother. Coleman learned of it and told his friends. A few days later, Coleman and Claybourne were driving through Lexington when they spotted Wortham, on foot. They enlisted the aid of Walker to "get" Wortham. Walker decided to bring along a shotgun. They confronted Wortham. Coleman shot him and Wortham died.

A friend of Coleman's, Alcorn, disposed of the gun. A tip led investigators to Coleman and Walker, who denied any involvement, and the "investigation stalled." In Feb. 2007, Alcorn and Walker gave statements concerning their involvement with the crime. Coleman was arrested pursuant to a warrant. The officer urged Coleman to confess, but he denied any involvement. He was handcuffed and given his Miranda rights. On the way to the station, Coleman invoked his rights to an attorney. As he was placed in a cell, the detective told Coleman that if he wanted to change his mind and talk, he should knock on the cell door. A few minutes later, he showed a photo of Alcorn to Coleman, who indicated he recognized him. Moments later, he agreed to waive his Miranda rights and talk.

Coleman requested suppression and was denied. Coleman was eventually convicted and appealed.

ISSUE: Is showing an incriminating photo to a subject "interrogation?"

HOLDING: Yes

DISCUSSION: Coleman argued that the reading of Miranda was faulty, and further, that the "detective's confronting him with the Alcorn photo amounted to continued questioning in the face of his request for counsel."[45] (Apparently the detective did not read the warnings from a card, as the list given in the opinion

[44] Michigan v. Mosley, 423 U.S. 96 (1975).
[45] Edwards v. Arizona, 451 U.S. 477 (1981)

was incomplete.) The Court disagreed with the first.[46] However, the Court agreed that the detective's actions were inappropriate, and that his actions in showing the photo were actions intended to elicit an incriminating response. But, the Court continued, the error was harmless and did not contribute to his ultimate conviction.

Coleman's conviction was affirmed.

Meade v. Com., 2009 WL 875034 (Ky. App. 2009)

FACTS: Meade was identified as a suspect in two break-ins that occurred in Pike County. Meade denied any involvement and was interviewed by Trooper Newkirk (KSP). Although Meade initially wanted an attorney, he eventually admitted to participating in the first, but not the second, break-in. After he was indicted, he requested suppression of the statement, arguing that he had been denied his right to an attorney. The trial court ruled that he had voluntarily waived that right, and further, that his intoxication did not invalidate the waiver. Meade took a conditional guilty plea and appealed.

ISSUE: Is an invocation of the right to counsel negated when the subject gives a valid waiver of that right?

HOLDING: Yes

DISCUSSION: The Court agreed that Meade did, in fact, properly invoke his right to an attorney.[47] He was not provided with counsel or the opportunity to seek counsel. However, the Court agreed, Meade's responses could be admitted "on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." The Court also agreed that Meade initiated further conversation with the trooper by commenting on something said by another state trooper at the scene concerning the offense.[48] The Court ruled that Meade validly waived his right to counsel by his statement - "f*** the lawyer" and continued to speak with Trooper Newkirk. Finally, the Court found that Meade's intoxication was not so severe as to invalidate his statements.

Meade's plea was affirmed.

Jones v. Com., 2009 WL 1974445 (Ky. App. 2009)

FACTS: On January 5, 2006, Goeing (the pharmacist) and several other employees were working at the Family Drug in Wheelwright. Three armed persons, wearing dark clothing, entered at about 10 a.m. It was agreed by the employees that they sounded like young men. Goeing was taken to the pharmacy and gave them about 5,200 hydrocodone tablets. They also took cash. During that time, a silent alarm had been triggered. One employee was able to slip out and alert workers at a neighborhood business. One of those employees saw the men leaving and later described the vehicle as a late-model Honda. Another witness, however, identified the vehicle as an Elantra (Hyundai), but agreed it was white with tinted windows. Yet another witness believed the vehicle was a Honda Accord. (Both of the later witnesses specifically stated they could read the model on the vehicle.)

KSP investigators arrived. They put out the vehicle description; Trooper Little pulled over Aaron Jones in response. He was questioned and released. The next day, a citizen found a number of items, including a

[46] See Oregon v. Elstad, 470 U.S. 298 (1985): California v. Prysock, 453 U.S. 355 (1981)
[47] Dean v. Com., 844 S.W.2d 417 (Ky. 1992); Smith v. Illinois, 469 U.S. 91 (1984).
[48] See Oregon v. Bradshaw, 462 U.S. 1039 (1983).

toboggan, a glove, a hooded sweatshirt and pantyhose with the legs cut out, near a pumping station, and KSP collected them as evidence. The investigators came to believe Adam Jones (the defendant), his brother Aaron and Chaffins were the suspects. That led them to question Fitzpatrick, Aaron's girlfriend, who provided information as to their movements on the day of the robbery – and stated that Jones told her that they were going to rob a pharmacy. That evening, they had pills and Aaron Jones had laughed about the misidentification of the car – in fact, they were driving a Honda Accord. Another witness, who was jailed with Chaffins, reported that Chaffins had told him he'd robbed the pharmacy and that they'd worn disguises that had been discarded at a strip mine site. Det. Crum then took out warrants for Chaffins and Adam Jones; both were indicted. Eventually Jones was convicted of first-degree robbery and appealed.

ISSUE: Does the fact that an officer and suspect are related require more protection of the suspect's rights?

HOLDING: No

DISCUSSION: Jones argued that his statements, given to police prior to his arrest, should have been suppressed. In fact, when Jones realized he was a suspect, he contacted Det. Howard and "told him he wanted to talk to him." (The two men were related.) Jones came to the station the next day and he was escorted to an interview room. Det. Howard stated "it was his understanding that Jones had been advised of his Miranda rights by Detective Crum or someone else before being placed in the interview room" but he didn't witness it and could not be sure if that was the case. He told Jones 'he had been implicated in the pharmacy robbery." He also told Jones that there was a warrant for his arrest and "that he would be arrested before he left the post." Det. Crum testified he had given Jones his Miranda warning in the hallway before the interview, because he knew it would be recorded. He apparently had him sign the waiver after the interview. The Court agreed that the officer's testimony was credible. Jones argued, also, that Det. Howard "should have taken special pains to personally advise him of his constitutional rights because their 'blood relationship' made Jones more 'vulnerable due to the fact that he was talking to his cousin as his cousin and not so much as a Detective in the case.'" As such, his statements should have been considered confidential or off the record. The Court disagreed.

After resolving a number of other issues, the Court upheld Jones's conviction.

Bassham v. Com, 2009 WL 3526647 (Ky. 2009)

FACTS: Bassham allegedly raped R.S. on October 18, 2005, in Louisville. He was indicted, convicted and appealed.

ISSUE: Does the finding of drugs create a custody situation?

HOLDING: Yes (but see discussion)

DISCUSSION: Bassham argued that statements he made to an officer, prior to his arrest, were nonetheless made while he was in custody. The statements were made prior to Bassham being advised of his Miranda rights and concerned "whether he had been at the Regency Trailer Park on the night of the crime." The statement was made after the officer stopped Bassham, by use of his lights and siren, while Bassham was riding his bike, and upon learning his name, connecting him to the rape. Bassham had already been patted down (after the officer removed a partially visible knife) and had admitted to having marijuana and Xanax, which the officer also confiscated.

The trial court decided that Bassham was not in custody at the time, but the appellate court ruled that since the drugs had been found prior to the statement in question, it was reasonable for Bassham to believe he was in custody at the time. He was "standing between two officers in front of a police car" and illegal drugs had already been removed from his person. The Court looked to the Lucas factors and concluded that since he'd already been touched twice, his belief was reasonable. The officer's questions were intended to "elicit an incriminating response." [49] However, ultimately, the Court concluded the error was harmless. On a side note, the Court also concluded that it was appropriate for the jury to conclude the knife in Bassham's pocket was concealed as it only became visible when he leaned over riding his bicycle.

Bassham's conviction was affirmed.

Cecil v. Com.
297 S.W. 12 (Ky. 2009)

FACTS: Cecil was accused of raping a young niece (under 12) and his sister-in-law (who was 14 at the time). As part of his investigation, Det. Judah (Louisville PD) interviewed Cecil. He denied having any contact with the niece, but did admit to sex with the sister-in-law, who he insisted "seduced him and forced herself upon him." He was indicted and the charges with each victim were severed. He was convicted of the first sexual assault and then took a conditional plea to the other charge. He appealed.

ISSUE: Is a person who comes in for a voluntary interview in custody?

HOLDING: No (unless the situation changes)

DISCUSSION: Cecil first argued that his statements to Det. Judah were taken without benefit of Miranda warnings. Det. Judah had testified, at a suppression hearing, that Cecil had come in for a voluntary interview and that he was told he could leave at any time. Det. Judah was alone during the interview. Cecil left the police station after the interview and was arrested four days later. The Court agreed that the circumstances were such that Cecil could not be considered to have been in custody during the interview, as such, suppression was not warranted. In addition, Cecil had moved to apply the "rape shield" law - KRE 412(b)(1)(C), with respect to admitting information concerning the (niece) victim's sexual conduct during a time where she had run away, which was following the rape by Cecil.. When she returned, she admitted to having been forced into sex during her absence. Cecil argued that was reason for her to fabricate the allegations against him, since she might fear having gotten pregnant or a STD. The Court agreed that it was appropriate for the trial court, which had taken an avowal from the victim outside the presence of the jury concerning the matter, to exclude the evidence from the jury.

The Court also agreed that the forensic interview did not improperly bolster the victim's testimony. Cecil's conviction (and plea to the second victim) was upheld.

Carver v. Com., 2009 WL 160438 (Ky. 2009)

FACTS: On or about April 15, 2006, Deloe found Carver at the home of Witcher, her boyfriend, "slumped over in a chair when she returned from the Allen County Fair demolition derby." When she approached Carver, "he jumped up exclaiming that he did not break into anyone's house." She called Witcher, who "returned home to confront the then unknown intruder" and they fought. (Carver later testified that Witcher had given him a ride and that they were both heavily intoxicated. Deloe called for help, and Officer

[49] Com. v. Lucas, 195 S.W.3d 403 (Ky. 2006).

Ford and Sgt. Cooke (Scottsville PD) were dispatched. They found Carver "conscious, but face down in the yard, having been physically beaten by Witcher." Carver was secured, and the officers later testified that he was "out of control and combative at the scene." For that reason, he wasn't frisked at the time. The officers found a window air conditioner knocked out and on the ground and several other items scattered around, and both Witcher and Deloe testified that the items were not that way earlier in the evening. Carver also kicked out a window of a police car.

Carver was taken to the hospital and was unhandcuffed for x-rays. He then produced a knife and flourished it. He finally surrendered the knife, which was identified at trial "as a type of a steak knife." Deloe testified that it belonged to her, but Carver argued that "he found the knife on the table he had knocked over at the hospital." Sgt. Cooke testified that Carver had said that Cooke "needed to have his boy [Officer Ford] check me a little better before he puts me in the car."

Carver was indicted for Burglary, CCDW and related charges. He was convicted and appealed.

ISSUE: Are statements made in an emergency situation subject to Miranda?

HOLDING: No

DISCUSSION: Among other issues, he argued that "the statements he made at the hospital regarding the knife he brandished were inadmissible at trial because they were made before receiving the Miranda warnings. (The admission raised the Burglary charge from Second Degree to First Degree.) The Court addressed the statement under the public safety exception, noting that his possession of the knife "at the hospital created a safety risk to … staff, patients police officers and himself."[50] In such situations, the Court stated the police "in potentially dangerous situations can ask questions which are necessary to establish safety but may not ask questions which are designed to elicit testimonial evidence from the suspect." The Court found no reason to question Cooke's initial question as to "what was he doing with the knife " to be anything other than an "attempt to immediately diffuse a dangerous situation."

However, the Court also found that while Carver was "technically in police custody … he was not in an inherently oppressive interrogation atmosphere." His lack of direct response to the question indicated that he "was not succumbing to the inherent pressure of police custody."

The Court found that the evidence indicated he had the gun during the burglary. After resolving other issues, Carver's conviction and sentence was affirmed.

Taylor v. Com., 276 S.W.3d 800 (Ky. 2008)

FACTS: On Dec. 29, 2003, Buckner was shot and killed in Louisville. Witnesses identified the suspect as brothers, and the police found the two (Raymond and Timothy Taylor) near the suspect vehicle. They captured Raymond and continued to search for Timothy. They tracked him, with a tip, to a nearby house and entered with the consent of the owner. They found Timothy and took him to a Louisville Metro Police Department office. Timothy spoke to Detectives Lawson and Schraut, and Taylor waived his Miranda rights. Timothy Taylor then confessed that he shot Buckner. Both Taylors were jointly charged with murder and the cases were severed. Timothy Taylor was tried first and was convicted. (Raymond subsequently pled guilty.) Timothy Taylor appealed.

[50] U.S. v. Quarles, 467 U.S. 649 (1984).

ISSUE: Is a technical violation of KRS 610.200 and .220 sufficient to require the suppression of a statement?

HOLDING: No

DISCUSSION: Taylor argued, among other issues, that his confession was inadmissible because the police violated KRS 610.200(1) and KRS 610.220(2) during his detention, and that he did not properly waive his Miranda rights. The Court agreed that the officers had sufficient probable cause to make the arrest. The Court also found that the police had spoken to the Taylor's mother at her residence and transported her to the local substation for her protection. They explained what had happened and she gave consent to search her home and vehicle. She was notified when Timothy Taylor was arrested and was informed of the charges against both boys. The Court agreed that although she was not notified immediately, but several hours later, the "fact remains that the police had made efforts to contact her and keep her apprised of the situation." The Court found that the confession was voluntary, and "can still be admissible even though the police did not adhere to the statutory provisions of the juvenile code."[51] (KRS 610.200.)

With respect to KRS 610.220, the Court found that Taylor was taken into custody at 3:41 p.m. Det. Schraut contacted the juvenile detention facility less than an hour later, but the CDW was not available. He asked that the CDW be paged at 5:33, and spoke to the CDW at 5:45 p.m. He requested, and received, a two hour extension. He requested and received a second extension at 7:22. At 9:45 p.m., Timothy was transported to the detention facility. The Court noted, however, that "even without considering the document," that a failure to strictly follow the provisions of KRS 610.200 does not automatically make a confession inadmissible."[52] The Court noted that once Timothy was identified as a minor, he was immediately advised of his Miranda rights, and received them a second time approximately an hour later. He signed a waiver, and actually received Miranda a third time, before his confession was recorded. The Court found his confession voluntary and admissible. The Court also noted that Taylor was "calm, aware of the consequences of his actions, and interested in helping himself by cooperating." He "was offered food, drinks, cigarettes and bathroom breaks."

Timothy Taylor's conviction was affirmed.

Tisdall v. Com., 2009 WL 2901293 (Ky. 2009)

FACTS: Tisdall was accused of sexual abusing his three-year old daughter while they sat in the family vehicle in Monroe County, at a gas station. (His wife had caught him and called the police.) The child was taken to the hospital, accompanied by Officer Hestand and another officer. At about 6 a.m., Officer Hestand and Harlan, a social worker, arrived at the family home. Both officials testified that Officer Hestand gave him Miranda warnings, although Tisdall claimed he didn't remember. Officer Hestand later stated, however, that Tisdall "was not under arrest and was free to terminate the interview if he desired." Tisdall "initially denied any misconduct, but later acknowledged that he'd touched the child for the "thrill of the moment." Hestand arrested him. He later got a written statement from Tisdall's wife, who noted that she suspected other abuse as well, which she had not reported.

Hestand returned to the jail, where Tisdall signed a waiver form and admitted to having fondled his daughter over several months. He recanted at trial and stated that his wife accused him to get him out of the house.

Hestand was convicted and appealed.

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[51] Murphy v. Com., 50 S.W.3d 173 (Ky. 2001)
[52] Shepherd v. Com., 251 S.W.3d 309 (Ky. 2008).

ISSUE: Is a statement taken at a person's home (without Miranda) admissible?

HOLDING: Yes

DISCUSSION: Tisdall first complained that Hestand's mention, at trial, that Tisdall had been taken to KCPC (Kentucky Correctional Psychiatric Center) for evaluation was improper and required mistrial. The Court agreed, however, that the trial court handled it properly, and that further the "statement was in passing, was only said once, and was likely not entirely understood by the jury." Tisdall also complained that the copy of his Miranda waiver had not been provided until the morning of trial. The Commonwealth stated that it had been "unintentionally left out of the discovery materials and that the mistake had only been realized that morning." The Court noted that the police report, which had been properly provided, had indicated the waiver had been executed. The Court agreed that although a discovery violation did occur, that "the late disclosure had little impact on the defense strategy."

Finally, Tisdall argued that "his oral statements to police made at his residence" should have been suppressed because they were "involuntarily given." He said he "felt intimated" by the officer and did not feel free to leave because Hestand stood in front of the door. He also claimed that he'd had little sleep and was trying to cooperate with law enforcement. Officer Hestand agreed that he had refused Tisdall's request to go into the bedroom for safety concerns. The Court agreed, however, that the trial court's determination was appropriate, given that the trial court had the benefit of actually seeing and judging the credibility of the witnesses.

Tisdall's conviction was affirmed.

SUSPECT IDENTIFICATION

Carter v. Com., 2009 WL 414356 (Ky. App. 2009)

FACTS: Carter and two accomplices (also part of the motion to suppress) were captured following a robbery. Two witnesses were "driven past" the cruiser where the three were "handcuffed and seated on the ground" and they identified the three as the robbers. They were indicted.

All three moved for suppression, which the trial court denied. Carter took a conditional plea and appealed.

ISSUE: Are the five Biggers factors critical in assessing the reliability of a show-up identification?

HOLDING: Yes

DISCUSSION: The Court reviewed the testimony from the identification. The two witnesses had described the two male suspects, by race, gender, weight and approximate age, and gave specific details on their clothing. The female was described in less detail. Office Ruzzene (Lexington PD) spotted the suspects and Officer Goldie assisted in capturing the three. Officer Ruzzene returned to pick up the witnesses. One of the witnesses stated that "Carter was the man who wielded the knife; however, the knife was actually found in the possession of Weathers." One of the two witnesses identified the robbers primarily by their clothing. The opinion noted that Officer Ruzzene made the stop approximately 20 minutes following the dispatch and that the showup was about 12 minutes later. The Court agreed that viewing the three suspects, sitting on the ground, handcuffed and surrounded by officers is inherently, and extraordinarily, suggestive.

The Court then reviewed the Biggers factors:

(1) the opportunity of the witness to view the criminal at the time of the crime;
(2) the witness's degree of attention;
(3) the accuracy of the witness's prior description of the criminal;
(4) the level of certainty demonstrated by the witness at the confrontation; and
(5) the length of time between the crime and the confrontation.

The Court noted that both witnesses "had good opportunities to view the group." When the robbery was committed, one of the witnesses "focused his attention on the events and circumstances surrounding the attempted robbery." It "has been held that a witness's attention during traumatic experience is presumed to be acute."[53] The descriptions given by the two witnesses "were very similar" and "each accurately remembered specific details concerning what the robber was wearing." The group's composition (two black males and one white female) added to the "accuracy element of the description." The witnesses were relatively certain (one more so than the other), "enough to amount to a positive identification." Finally, the length of time that elapsed, and the short distance away where the suspects were caught, "favor[ed] the identification." All five factored "weigh heavily in favor of the reliability of the identification."

The Court upheld the denial of the suppression motion and Carter's conviction was affirmed.

Finch v. Com., 2009 WL 1811547 (Ky. App. 2009)

FACTS: Finch was indicted for six counts of first-degree robbery, for offenses that occurred in a six-week period in 2005 in Louisville. Three of the victims chose Finch from a photo-pak. Finch moved to suppress, which was denied. He then took a conditional plea of one-count of second degree robbery. He then appealed.

ISSUE: Is a photo-pak, in which the suspect photo is different from the remaining photos, inherently suggestive?

HOLDING: No (but see discussion)

DISCUSSION: The Court reviewed the photo-pak, which contained "six photographs on one piece of paper." Finch argued that the witnesses that identified him all stated he'd been wearing a hoodie and that his was the only photo in the pak that had the individual wearing a hoodie. The rest were wearing t-shirts. He also argued that the "non-sequential simultaneous photographs shown by an officer who knew the suspect was included in the array and presentation of the array by an officer who knew that [Finch's] photo was in the array" was "inherently suggestive." The Court disagreed, however, that the identifications were made by victims who had been robbed at gunpoint, and that "each victim undoubtedly paid a high degree of attention" to the robber. The "factors weigh heavily in favor of reliability."

Finch's plea was upheld.

[53] Levasseur v. Pepe, 70 F.3d 187 (1st Cir. 1995).

TRIAL PROCEDURE / EVIDENCE

Reed v. Com., 2009 WL 735884 (Ky. 2009)

FACTS: Reed was charged, along with several others, in Rowe's murder in Magoffin County. During the course of the trial, a bailiff overheard a witness tell another that a few years before the murder, Reed had threatened Rowe. The bailiff passed it on to the prosecutor, who immediately notified the court and the defense attorney that he would be questioning the witness about the matter. The defense attorney objected, under RCr 7.24 and RCr. 7.26. The court allowed the defense attorney the opportunity to question the witness before she took the stand, but she was allowed to testify at trial. He was convicted at trial and appealed.

ISSUE: Is the defense entitled in discovery to unrecorded inculpatory statements made by the defendant or others?

HOLDING: Yes

DISCUSSION: Reed argued that the admission of such testimony "unfairly surprised and prejudiced him and "amounted to 'trial by surprise.'" The Court, however, noted that the Commonwealth was only required to disclose evidence under RCr 7.24 such oral statements that it was aware of, and in this case, it was not aware of the statement and disclosed it immediately upon discovery.[54] In addition, RCr 7.26 was not violated since the statement was never recorded in any way. The Court agreed that its admission was not error. Reed also argued that the admission of the testimony of several individuals, include police, that improperly bolstered another witness's "prior out of court statements which were consistent with her trial testimony" was appropriate. The Court, however, noted that one of the detectives did not introduce any hearsay, but simply confirmed …"that [the witness's] version of the incident remained essentially the same throughout the investigation." Further, the fact that her statements remained the same after a grant of immunity as it was before was credible and worthwhile evidence.

Reed's conviction was affirmed.

NOTE: *Although in this case, the statements were admitted, it is absolutely critical that any oral inculpatory statements that are to be used at trial be provided to the defense in discovery.*

Dalton v. Com., 2009 WL 735882 (Ky. 2009)

FACTS: Dalton and several others were accused of robbery and murder. Three of the co-conspirators accepted plea deals. Dalton was convicted of Robbery and Complicity to Murder. She took a conditional sentencing agreement and appealed.

ISSUE: Is repeating a non-inculpatory statement made by a co-defendant hearsay?

HOLDING: No

DISCUSSION: During the trial, one of the investigators "was allowed to testify about his interrogation of the non-testifying co-defendant, Ricky King." The Court noted that also it was characterized as an error under Crawford v. Washington. In fact, "it actually lies at the intersection of Crawford and Bruton[55]." The Court,

[54] Stone v. Com., 418 S.W.2d 646 (Ky. 1967).
[55] Bruton v. U.S., 391 U.S. 123 (1968).

however, found that neither applies, "because the statements do not inculpate Dalton." They are, however, hearsay, and "[a]s no exception to the hearsay rules applies in this situation," it was error to admit the testimony.[56] But again, it was harmless error because the testimony did not inculpate Dalton.

Dalton's conditional sentencing agreement was affirmed.

Cuzick v. Com., 276 S.W.3d 260 (Ky. 2009)

FACTS: On Dec. 16, 2006, Officer Sapp (Nicholasville PD) was driving his marked car, but off-duty. He spotted Cuzick driving recklessly and he "turned on his lights, turned on the in-car camera, and began pursuit." He caught up with Cuzick and got out, but Cuzick fled. Sapp continued the chase, "traveling parallel to [Sapp] in the correct lane and with a spotlight trained on [Sapp's] car." Officer Faddasio and Corporal Fleming arrived and the "three patrol cars fell in line in a high-speed chase" that "continued for approximately three to four miles and reached speeds in excess of eighty-five (85) miles per hour, during which time [Cuzick] was driving erratically and weaving from side to side." Sapp tried to do a "rolling roadblock" with no success. Eventually Cuzick's car began to smoke and he coasted to a stop. The officers exited with guns drawn and ordered him to get out. He was on the cell phone and "ignored the officers' orders." The officers forcibly removed him. They noted a "strong smell of alcohol" and he continued to resist.

Cuzick was charged with Fleeing and Evading, Resisting Arrest, DI and related charges. He was convicted and appealed.

ISSUE: May officers narrate a video in which they played a part?

HOLDING: Yes

DISCUSSION: Cuzick argued that the Court "should not have allowed two police officers to narrate videos played during their trial testimony - the substance of the videos having been captured from cameras mounted in their cruisers…." During Corporal Fleming's testimony, he responded to the prosecutor's questions "describing the images on the video from his perspective as they happened." The Court found that the "fulcrum of the matter" rested upon "whether the witness has testified from personal knowledge and rational observation of events perceived and whether such information is helpful to the jury." The Court noted such witnesses "may not 'interpret' audio or video evidence." In this case, the court found that the "testimony was explicative of the officer's perception of the events occurring on the video as they perceived them during the police chase and provided further elucidation of matters of police procedure, etc., which were not readily identifiable from the video standing on its own." Further, the Court found it was not improperly cumulative to play both videos because each showed information critical to the charges.

After resolving several other issues, Cuzick's conviction was affirmed.

Stuckey v. Com., 2009 WL 160618 (Ky. 2009)

FACTS: During the course of Stuckey's trial on an assortment of felony charges, Det. Polin (Louisville Metro PD) "testified about a phone conversation he had with [Stuckey]." Stuckey claimed that the prosecutor had not disclosed the phone call "when the officer told the prosecutor on the morning of trial about the call," which the Commonwealth conceded.

[56] KRE ; RCr 9.24.

ISSUE: Must oral incriminating (inculpatory) statements be provided to the defense in discovery?

HOLDING: Yes

DISCUSSION: The Court noted that the "Commonwealth had a continuing duty to provide discovery"[57] and was required to turn over "any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness…." The conversation was considered "evidence of flight (and thus evidence of guilt)." The Court agreed that evidence of flight was relevant and admissible.

The Court noted that"

> Though on appeal the Commonwealth relies on Brady v. Maryland, the statement at issue in this case is inculpatory, and thus subject only to the discovery rules.[58] Under these rules, however, the Commonwealth's purported justification that it only brought up the conversation on re-direct examination does not change the fact that it was evidence offered by the Commonwealth in violation of the discovery rules . This Court passed upon the same issue recently in Chestnut v. Commonwealth where "[t]he Commonwealth assert[ed] that even if the failure to disclose the statements was a discovery violation, the statements could be used in rebuttal." This Court responded, "the duty of discovery imposed by RCr 7.24(1) to disclose incriminating statements does not end at the close of the Commonwealth's case in chief. Rebuttal does not offer a protective umbrella under which prosecutors may lay in wait."[59].
>
> In Chestnut, this Court read RCr 7.24 in line with its plain meaning and held that an incriminating oral statement by a defendant does not have to be written down in order to be subject to discovery. ("[W]e find that it is apparent from a reading of the language of the rule that RCr 7.24(1) was intended to apply to both oral and written statements, which were incriminating at the time they were made ." . Therefore, the "nondisclosure of a defendant's incriminating oral statement by the Commonwealth during discovery constitutes a violation of the discovery rules under RCr 7.24(1), since it was plainly incriminating at the time it was made." This is clearly the case here, since part of the Commonwealth's case relied on evidence of Appellant's flight. However, the analysis does not end here ; "[t]he United States Supreme Court has held that a discovery violation serves as sufficient justification for setting aside a conviction when there is a reasonable probability that if the evidence were disclosed the result would have been different."

However, in this situation, the defense had made a timely objection, so the jury did not hear the substance of the telephone call, only that it was made. As such, although the discovery rules were violated, there was no need for a mistrial. The Court also found that the victim in the case, McPherson, suffered a gunshot wound in both legs that broke one, and which required surgery. McPherson also required a "surgical nail and screws, he was using a walker, and he was sent to a rehabilitation center." The Court agreed that it was a "prolonged impairment of health" that a reasonable jury could believe he may have [trouble healing] from at his age."

After resolving several other issues, Stuckey's conviction was affirmed.

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[57] RCr 7.24(8).
[58] 373 U.S . 83 (1963),
[59] 250 S.W.3d 288 (Ky. 2008),

Rice v. Com., 2009 WL 275860 (Ky. 2009)

FACTS: Rice stood trial for two counts of Assault on the Third Degree, along with other charges, and was convicted. He then appealed.

ISSUE: Should testifying officers avoid contact with each other during a trial?

HOLDING: Yes

DISCUSSION: Rice argued, among other things, that "it was error to allow a second police officer to testify." The police officer had apparently been in the courtroom prior to testifying, but the Court recognized that "no one had invoked the rule requiring what is commonly termed separation of witnesses."

The Court continued:

> When Officer Litton finished testifying, he was seen entering a restroom in the company of another police officer. The second officer was scheduled to testify next. Officer Litton was first, however, brought before the trial court and questioned about any interaction with the other officer. Officer Litton indicated he told the other officer that he, Officer Litton, was not doing a very good job testifying. There was no indication that any testimony was specifically discussed.

No objection was made to the officer's testimony. The Court noted, also, that a juror had reported to the court that "he had heard a man talking earlier in the morning about 'clothes line.'" "It was presumed this referred to a method sometimes used by police officers and others to tackle a person. The second officer used the term during his testimony, and Rice argued that was "evidence of some form of coaching or collusion by Officer Litton when they were in the restroom."

The Court found no error in Rice's allegations and upheld the conviction.

Justice v. Com., 2009 WL 563510 (Ky. App. 2009)

FACTS: Justice was charged with manslaughter in the drowning death of her 5-year-old developmentally delayed son, Joshua. Following the discovery of the child's body, in a neighbor's pool, the police "knocked repeatedly" on her door, and then "began beating the siding of the trailer with their batons to get an answer." She answered the door after some ten minutes of pounding and the officers believed she had been asleep. Justice was taken to the hospital, and "gave inconsistent statements concerning the events leading up to the drowning." She refused a request to search her trailer, refused to give blood or urine samples to determine if she was intoxicated, and invoked her right to an attorney and to remain silent. She was eventually indicted.

After a lengthy trial, she was convicted of Second-Degree Manslaughter and appealed.

ISSUE: Is testimony about a defendant's silence or choice to exercise their "rights" admissible?

HOLDING: No

DISCUSSION: First, Justice argued that the statement by Det. Hayes (Pikeville PD) that she had refused to consent to giving a biological statement was improperly admitted and the Court agreed.[60] Her "passive refusal to consent to give biological samples is 'privileged conduct which cannot be considered as evidence of criminal wrongdoing.'"

In addition, Det. Hayes stated that "Justice had exercised 'her rights.'" Although the statement was ambiguous as to what "rights" the officer was referring to, the Court noted that the "Commonwealth is prohibited from introducing evidence or commenting in any manner on a defendant's silence once that defendant has been informed of her rights and taken into custody."[61] Although this occurred prior to Justice being informed of her rights and having been placed into custody, the Court noted that "the giving of a Miranda warning does not suddenly endow a defendant with a new constitutional right. The right to remain silent exists whether or not the warning has been or is ever given."[62] As such, the comment was improperly admitted.

Justice also complained about numerous witnesses who testified as to her "prior bad acts" concerning her neglect regarding her son. The Commonwealth had sought to have such evidence admitted under KRE 404(b), and the trial court had permitted it. The Court concluded that only two of the witnesses testified to matters of relevance during the time period in question, but the remaining acts occurred well before the date of Joshua's death. The Court found that the "prior bad acts (one incident of which occurred 14 years before Joshua's death) were not useful in proving any material fact that was in actual dispute - the touchstone for admissibility of prior bad acts." The Commonwealth argued the cumulative evidence showed that she had "the propensity to neglect her children" and that the drowning was not a "one-time fluke."

Justice's conviction was reversed and the case remanded back, with instructions that the testimony of the officers also be cautioned in any further prosecution. The Court noted that their errors were not sufficient, in themselves, to have overturned the conviction, but addressed the errors so that they would not be repeated.

Morrow v. Com., 286 S.W.3d 206 (Ky. 2009)

FACTS: In 2002, Morrow, a former special deputy in McCreary County and a part-time deputy jailer in Whitley County, became involved with Tapley. Tapley was a confidential informant with KSP and there was a surveillance camera at his home to "capture staged drug transactions." When Morrow was identified as being connected with drug trafficking, it was suggested Tapley "pursue [Morrow] as a possible target." As such, Tapley visited Morrow under the pretense of discussing an antique car restoration. Tapley complained of pain and asked if Morrow (or his brother, Ernie) could get him anything – Ernie was known to have cancer and had pain medications.

"Over the course of the next several days, Tapley vigorously pursued [Morrow] and his brother, calling repeatedly and stopping by [Morrow's] house on more than one occasion." Eventually, Morrow facilitated a drug transaction between Ernie and Tapley. The Morrows went to Tapley's home. Morrow waited outside while Ernie went into Tapley's garage. Morrow, however, was called in to calculate the price of the transaction, an exchange of Oxycontin.

Some months later, Morrow was charged with complicity to traffic and Ernie was charged with first-degree trafficking. Ernie eventually took a plea agreement.

[60] See Deno v. Com., 177 S.W.3d 753 (Ky. 2005).
[61] Romans v. Com , 547 S.W.2d 128 (Ky. 1977).
[62] Green v. Com., 815 S.W. 2d 398 (Ky. 1991).

At trial, Morrow presented alternate defenses of entrapment and that he was actually conducting an independent undercover drug investigation of his own. He was, however, convicted, and then appealed.

ISSUE: Does presenting an alternative defense prevent a subject from also raising an entrapment defense?

HOLDING: No

DISCUSSION: The sole issue on appeal was whether the trial court should have tendered an instruction on entrapment to the jury. It had refused to do so, based upon prior Kentucky case law that held that an instruction on entrapment was not appropriate when the subject was presenting an alternative defense as well.

With respect to the entrapment, the Court agreed that Tapley was a paid CI, and that it was Tapley who "first broached the issue of whether [Morrow] could supply him with Oxycontin and that all subsequent conversations between the Morrow brothers and Tapley were initiated by Tapley." The Court also agreed there was "ample testimony … that Tapley was quite persistent in his efforts" with both of the Morrow brothers. With that evidence, the burden shifted to the Commonwealth to prove that Morrow "was predisposed to engage in the criminal act prior to inducement by the government or its agent." The Court agreed that Morrow "had never been in any trouble prior to his arrest." He had initially denied to Tapley that he was involved with drugs and his name had not appeared on a list submitted by Tapley previously concerning "people he knew had involvement in the drug trade in the community."

The Court noted that the "x-factor" in this case was that Morrow claimed to be "engaged in an independent drug investigation under the auspices of garnering future employment" as he was involved in the election campaign for Sheriff Perry. He claimed he had begun to gather evidence on Tapley and wanted Tapley to believe that Morrow was involved with drugs so that he could make buys in the future. The Court stated that the "crux of the present matter" was whether Morrow's "assertion that he was engaged in the transaction for purposes of an independent criminal investigation preclude him from alternatively asserting that he was entrapped." The Court reviewed the prior history of the entrapment defense in the federal courts[63] and agreed that although Morrow admitted his involvement in the transaction, that he did deny "one or more elements" of the offense" and as such he was entitled to having the defense at least instructed to the jury.

The Court ruled that a "criminal defendant may properly deny one or more elements of a criminal offense and alternatively claim the affirmative defense of entrapment *if* sufficient evidence is introduced at trial to warrant instructing the jury as to the defense." In this case, the agreed that although the trial testimony was in conflict, that there was sufficient evidence to warrant the instruction.

Morrow's conviction was reversed.

Vincent v. Com., 281 S.W.3d 785 (Ky. 2009)

FACTS: In 2005, Edmonson County officers began an investigation of allegations that Vincent had sexually abused his granddaughter, C.V. Two of his daughters, J.H. and A.M. asserted that he had also sexually abused them as children, subjecting them to sexual abuse, rape, sodomy and incest. He was indicted on multiple counts against the three victims.

[63] Mathews v. U.S. 485 U.S. 58 (1988); Sorrells v. U.S., .287 U.S. 435 (1932); Sherman v. U.S., 356 U.S. 369 (1958).

At trial, each victim testified to multiple offenses over a period of years, although none could specify the exact number of times each occurred. Out of 294 initial counts, eventually 29 counts were actually presented to the jury.[64] He was convicted on all counts and appealed.

ISSUE: Is a brief comment that a person "chose not to speak" to police enough to warrant a mistrial?

HOLDING: No (but see note)

DISCUSSION: Vincent argued that the overcharging was an attempt by the prosecution to bias the jury. Although the Court agreed that it would not "condone an intentional, baseless tenfold overcharging of criminal counts," in this case, Vincent was not entitled to relief on that account. Vincent also argued that he had been entitled to a mistrial when "a testifying officer" made a "reference to his exercising his right to remain silent." The officer had described his interview with the victims, and that he then went to talk to Vincent, who "chose not to speak" to him in reference to the crime. The prosecutor had argued, in response to Vincent's objection, that the reference was inadvertent. The judge offered to admonish the jury on that respect, which Vincent declined. The Court agreed that the "prosecution did not intentionally elicit reference to Vincent's refusal to speak to police" and found the reference was "isolated and brief" and did not compromise his right to a fair trial.

Vincent further argued that the investigating officer "testified that the alleged victims 'disclosed years of rape, sodomy[,] and incest'" by Vincent. Vincent did not object to the testimony. They Court agreed that the officer's statement may have been hearsay but that the "admission of the police officer's very brief summary of what the alleged victims told him" was not error, particularly "given the victims' graphic testimony that followed." As such, any "erroneous admission of 'investigative hearsay'" did not rise to the level of error.

Vincent's conviction was affirmed.

NOTE: *Although the officer's statements did not cause the verdict to be overturned in this case, officers must be very cautious not to comment on a suspect's decision to remain silent or to repeat hearsay.*

Kreps v. Com., 286 S.W.3d 213 (Ky. 2009)

FACTS: Kreps and his wife, Renee, became the guardians for A.S. Some moths after that, Renee was involved in a serious crash and lived in a rehab center, while A.S. continued to live with Kreps and visit with her mother. On July 1, 2005, about a year after A.S. moved in, a social worker, Timmons, received an anonymous tip that A.W. was pregnant by Kreps. She contacted Dep. Drew (Graves County SO) and Dep Drew went to try to interview Kreps. No one was home, but they learned from Gibbs that Renee was still in rehab and that Kreps, A.S. and her mother were on a houseboat. Gibbs also claimed that he was "romantically involved with Kreps."

They interviewed Renee, who denied there was an inappropriate relationship and also interviewed Kreps, A.S. and her mother. All denied the relationship or that A.S. was pregnant. Her mother, however, removed her from Kreps' boat and took her to stay with other friends. The mother then deceived A.S. into believing that A.S. was pregnant, but creating a false pregnancy test. A.S. admitted having sex with Kreps, but denied it again upon learning of the deception. The friends learned of this and reported the situation to the McCracken County SO. Dep. Drew followed up and A.S. finally made a detailed statement admitting the sexual relationship. Kreps also, subsequently confessed.

[64] Due to family circumstances, there was confusion as to how many of the incidents actually occurred in Edmonson County.

Kreps was indicted on both Rape 2nd and Rape 3rd since A.S. had turned 14 during her time with the Kreps. He recanted his confession. However, he was convicted and appealed.

ISSUE: Is an officer who is acting as an intermediary with the prosecutor involved in "plea negotiations?"

HOLDING: Yes

DISCUSSION: Kreps argued that his statement to the police should not have been admitted as "it was made during the course of a plea discussion with the prosecutor and prohibited by KRE 410." The trial court "acknowledged that the interrogating officers told Kreps that "they couldn't promise anything, but they could relate the fact of his cooperation, and they could make recommendations to the prosecutor's office" However, the trial court admitted the statements. The Court of Appeals, however, noted that Officer Drew was in contact with the prosecutor by telephone and acted as an intermediary between the two both in negotiating the downgrade of the charges and in trading information concerning A.S.' s mother. The Court found it was "reasonable for Kreps to expect that he and the Commonwealth were negotiating a plea based on the totality of the circumstances."

The Court reversed Kreps's convictions.

Com. v. Stone, 291 S.W.3d 696 (Ky. 2009)

FACTS: On July 8, 2004, Griffin, Gray and two others became involved in a fight with Stone and four of his friends, including the Ursry brothers. "Aggressive words were exchanged, leading Eddie Ursry to physically attack Gray." Griffin's companions fled, leaving him alone with Stone and his four friends. "Griffin then picked up a large beer bottle" and struck Jeremy Ursry in the head. Ursry fell to the ground, the bottle broke, and Griffin was left holding the jagged remains. Stone later claimed that "Griffin then advanced toward him, wielding the shattered bottle as a weapon" and Stone pulled a knife in response. "Whether [Stone] thrust the knife towards Griffin, or Griffin lunged forward against the knife, is a matter of controversy." Griffin was fatally stabbed and Stone and his companions fled the scene. Stone cleaned the knife and gave it to Holbeck (another of the four companions) to hide.

Stone and his friends were quickly identified. All four were interviewed by Det. Duncan (Louisville Metro PD) and all but Eddie Ursry gave voluntary statements. Charges were filed and the court ruled that they would be tried together. Because it was anticipated that none of the defendants would testify at trial, the "out of court statement of each … was carefully redacted to eliminate any references to the other defendants…." However, at trial, the prosecution was permitted to get into evidence much of the redacted information through the testimony of Det. Duncan, who responded to questions on redirect that referenced the redacted information. Upon appeal, the Kentucky Court of Appeals ruled the "introduction into evidence of those portions of Holbeck's previously-redacted statements nullified the effect of the redaction and thereby violated [Stone's] Sixth Amendment right to confront the evidence …."

The Commonwealth appealed.

ISSUE: Is a statement incriminating the defendant made by a non-testifying co-defendant admissible against the defendant?

HOLDING: No

DISCUSSION: Stone argued that "Crawford[65] has 'eclipsed' Bruton[66] and Richardson,[67] and now Crawford controls the admissibility of out-of-court statements in criminal cases." The Court looked to its recent decision in Rodgers v. Com.[68] to decide the matter. First, it reiterated that its "recent holding in Rodgers that Crawford does not overrule the Bruton and Richardson line of authority." Instead, they "simply each apply to different circumstances." Bruton and Richardson, and the "cases descending from them, address the dilemma that arises when two or more defendants are jointly tried, and one (or more) of them has made a voluntary out-of-court statement which the prosecution wishes to present as evidence at trial."

> The Bruton/Richardson line of cases resolves the dilemma, preserving the advantages of joint trials, by allowing the trial court to admit the statement into evidence after redacting from it any direct or implied reference to another defendant, and any section which, on its face, incriminates another defendant." Richardson holds that an out-of-court statement of a defendant which incriminates another defendant only through its 'linkage' to other evidence need not be redacted, if a limited instruction is given to admonish the jury not to consider the statement as evidence against any defendant other than the declarant. A defendant's out-of-court statement can only be used against a co-defendant if the defendant is subject to cross-examination.

Continuing, the Court stated:

> Crawford, on the other hand, applies when the out-of-court statement is offered as evidence against a defendant other than the declarant. Crawford holds that a defendant is denied his Sixth Amendment right to confront his accusers by the introduction into evidence of an out-of-court 'testimonial statement' made by a declarant who is unavailable for cross-examination.

The prosecution's argument was that the statement did not directly implicate Stone, "but does so only when linked to other evidence in the case, and thus under Bruton and Richardson, may be admitted into evidence with an appropriate limiting instruction to protect [Stone]." The Court found that argument to miss the point, because the statement was introduced not to implicate Holbeck (the speaker), but "solely to incriminate [Stone] by refuting his claim that the victim was" coming after him with a broken bottle." The Court noted that "[a]ny incriminating effect of the statement on Holbeck was purely coincidental to its effect on [Stone] because Holbeck and the other defendants were charged only as accomplices to [Stone]."

The Court further stated that:

> The Bruton/Richardson analysis, which functions to *prevent* the out-of-court statement from incriminating the non-declarant defendant, cannot operate when, as in this case, the only purpose for admitting the statement was to incriminate the non-declarant. A vital element of Bruton/Richardson is the limiting instruction – the admonition that the jury may consider the statement as evidence against the declarant, but not against the defendant. Such an admonition becomes irrational when the sole purpose of the statement is to incriminate the defendant.

Since Bruton/Richardson did not apply, the Court looked to Crawford. The Court stated that:

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[65] 541 U.S. 36 (2004)
[66] 391 U.S. 123 (1968)
[67] Richardson v. Marsh, 481 U.S. 200 (1987)
[68] Rodgers v. Com., 285 S.W.3d 740 (Ky. 2009)

> Holbeck's statement that at the time of the stabbing, Griffin was 'backing up' and 'backing away' is exactly the sort of 'testimonial' evidence that, under Crawford, violates the Sixth Amendment. It is a statement taken by police officers in the course of an interrogation, made out-of-court, offered into evidence to prove the truth of the matter asserted, to establish the guilt of the accused. Holbeck was unavailable for cross-examination, and [Stone] had had not previous opportunity to confront him through cross-examination. The use of his testimonial statement at trial violated [Stone's] right under the Sixth Amendment, as enunciated in Crawford.

The Court also agreed that Stone did not open the door to admitting the statement "through his own cross-examination of Detective Duncant and thereby … waived his right to object to it." The Court concluded that Stone was entitled to a new trial under Crawford.

Isom v. Com., 2009 WL 4060474 (Ky.App. 2009)

FACTS: In September, 2006, Isom was arrested in connection with theft of mail from Lexington residences. A few weeks later, he was identified as a suspect in the cashing of a check from another piece of stolen mail. Eventually, he pled guilty to numerous charges related to the theft, as well as a single count of criminal possession of a forged instrument for the check (in which he scratched out the initial payee's name and substituted his own). Some months later, Isom was identified as a suspect in another, virtually identical theft. In his trial for the second check, the prosecution gave notice that it intended to use the first conviction as evidence. The trial court agreed that it amounted to a "signature crime" and that it would be admitted. Isom took a conditional guilty plea, and appealed.

ISSUE: May signature crimes be introduced in trials of other similar crimes?

HOLDING: Yes

DISCUSSION: The court noted that introducing the evidence was done to "establish a course of conduct, modus operandi, or signature crime." KRE 404(b) provides that generally, evidence of other crimes is not admissible, but that it can be admitted if it is "strikingly similar" to the current charged offense. The Court agreed that Isom's two check-related arrests both involved him scratching out the payee's name and substituting his own and then using his OL as ID to cash the check. The Court agreed that "proof that Isom had committed a similar crime was therefore relevant to prove the requisite intent by showing a 'plan, knowledge … or absence of mistake or accident' and what therefore was properly admissible."

Isom's conviction was affirmed.

White v. Com., 2009 WL 3165547 (Ky. 2009)

FACTS: White was involved in an altercation with his girlfriend in 2007. Paducah officers responded and captured him. He fought with several of the officers and was Tased. When the effect of the Taser wore off, he became combative and began cursing, as he was detained in the back of the cruiser. "The video apparently depicts White vehemently cursing and issuing verbal threats for the next twenty minutes, the entire time it took to transport him to the police station."

Among other offenses, White was charged with Third-Degree Assault. Due to an error, they amended the

charges late to include the Fourth-Degree offense against his girlfriend. He was convicted of both charges and appealed.

ISSUE: May video of a transport be used to prove the state of mind of the subject?

HOLDING: Yes

DISCUSSION: White argued that the admission of the video of his conduct following his arrest "was so inherently prejudicial as to outweigh whatever probative value it may have had." The Court had only permitted the introduction of the first few minutes of the video, stating that it was "relevant evidence tending to prove White's state of mind at the time of the offenses." The appellate court agreed that the recording and the "steady stream ot White's curses and threats" gave credence to the testimony of the police and the girlfriend.

After disposing of White's arguments concerning the mistake on the indictment, the Court upheld his conviction.

Hall v. Com., 2009 WL 2707225 (Ky. 2009)

FACTS: On May 5, 2006, Hall and Dylan (McIntosh), age 13, her son, had accepted an invitation to spend the night with Watson and Land, in Campton. Dylan, who suffered from ADHD, was hyperactive and because she was out of his prescribed medication, Depakote, Hall gave him one of her Klonopin, instead. She later learned that Watson had also given him a Klonopin. The three adults "engaged in heavy drug use," smoking and injecting methadone, for which Land had a prescription. Hall admitted that they had given Dylan a "line" of crushed methadone at some point in the evening. She also stated, later, that Dylan told her Watson had given him a "bunch" of methadone pills, but that she only told him to put them up, that he didn't need them, she did not take the pills from him.

Hall stated that Dylan went to sleep about 11 p.m. and that she could not rouse him at about 6 a.m. for school because he was "snoring deeply." At about 10 a.m., when she awoke again, she found that his "lips had turned blue." Land's mother arrived, for an unrelated reason, and she called for help. Dylan was taken to the hospital, where he died, and his death was attributed to acute methadone intoxication.

Hall, Land and Watson were all indicted for wanton murder in conjunction with Dylan's death. Hall was convicted and appealed.

ISSUE: May the statements of other co-defendants be repeated when done so only to put the defendant's statement into context?

HOLDING: Yes

DISCUSSION: The Court ruled that the evidence did not indicate that Hall engaged in wanton conduct, as there was no indication she actually perceived a risk (an overdose of methadone) and ignored it. As such, reckless homicide might have been the more appropriate charge. The Court ruled that since the jury was instructed on reckless homicide, along with manslaughter and wanton murder, that it was appropriate to reverse the wanton murder conviction and retry Hall on the lesser-included offense of reckless homicide, since there was sufficient evidence to prove that offense. (Had the jury not been so instructed, double jeopardy would attach and retrial would not have been possible.)

Hall also argued it was inappropriate for Det. Gibbs to repeat certain portions of her redacted statement, concerning what the other defendants had told him and her replies to his questions. The Court, however, ruled that the statements "provide[d] necessary context for Hall's statements," and that his attempts to challenge her statements with those made by the other defendants was a "valid interrogation technique." The statements made by the other co-defendants were not introduced for the truth of the matter asserted, which would make them hearsay, but "only to show why and how Hall's statement evolved as it did." The Court agreed with Hall, however, that comments reflecting her recent time in jail should have been excluded.

The Court agreed that there was insufficient proof of wanton murder, and sent the case back to the trial court on remand.

Martinez v. Com., 2009 WL 2706958 (Ky.,2009)

FACTS: Martinez was charged with involvement in an armed robbery in Owensboro that resulted in the death of one of the employees. Martinez apparently drove a vehicle (identified as the Latino Taxi) that picked up the suspects, which was caught on surveillance tape and he later denied having done so. Prior to the trial, the other three robbers pled guilty and agreed to testify against Martinez. At trial, Det. Burns (Owensboro PD) testified that when Martinez asked for an attorney, the interview ended. He also testified that Martinez's reactions to the interrogation indicated guilt. (In a footnote, the Court noted that after Martinez requested an attorney, other officers improperly continued to question him and that information was properly suppressed.) Martinez was convicted and appealed.

ISSUE: Is it appropriate to comment on the reactions of a subject to an interrogation?

HOLDING: No

DISCUSSION: Martinez first complained that Det Krauwinkel (Owensboro PD) had several times denied that a disputed sign on his taxi was not on the vehicle and refused to agree that it was possible the sign didn't appear simply because the tape was of such poor quality. (He had finally conceded it was possible, but only after repeated representations that it could not be.) The Court agreed that Martinez had the opportunity to, and did, in fact, present evidence that the sign was on the vehicle. With respect to Det. Burns's testimony, the Court agreed that it was not appropriate to state that Martinez acted guilty, because he lacked any personal knowledge about his guilt, but did not find that the error was not sufficient to warrant reversal.

Martinez's conviction was affirmed.

Sizemore v. Com., 2009 WL 4251685 (Ky. 2009)

FACTS: John Sizemore was charged with the beating murder of Gerald Sizemore (apparently no relation). Manchester PD received tips that led them to John Sizemore's home. His brother, Eugene, who lived next door, indicated there had been a fight at John Sizemore's home and officers found broken glass and blood. John Sizemore answered the door and allowed officers inside. They seized several items and noted that Sizemore exhibited some injuries.

John Sizemore agreed to go to the station and make a statement. He stated Gerald had showed up bleeding and said he'd been in a fight, and that he was drinking and "snorting Xanax." Gerald became highly aggressive and John Sizemore got him out of the house. (John also stated he was intoxicated at the time and really wasn't sure what had happened.) More items were seized the next day, pursuant to a warrant. John Sizemore was arrested. He gave another statement, in which he admitted striking Gerald with either an

ashtray or a barbell, and that he shoved him out the door. The police, not believing that Sizemore had told everything, interviewed him again, and he stated that his brother and another individual had come to his aid and that two of the men had beaten and stomped Gerald outside. He also stated that they'd tried to clean up the scene afterward.

All four men were indicted but Sizemore's trial was severed. He was found guilty of complicity to commit murder and appealed.

ISSUE: Is it appropriate to refer to a defendant's prior criminal history in trial?

HOLDING: No

DISCUSSION: Among other issues, Sizemore argued that it was inappropriate to allow the introduction of "his admission to police that he had just gotten out of a Minnesota prison prior to or during 2007." The Court agreed the statement was irrelevant and as such, it should have been redacted. However, it disagreed the error was so prejudicial that its admission should have caused a mistrial..

Sizemore's conviction was affirmed.

Jackson v. Com., 2009 WL 3526660 (Ky. 2009)

FACTS: In 2006, Johnson was a CI for the Owensboro PD, making drug buys. On June 23, he called Green to buy crack cocaine. He inadvertently called her at her mother's residence, Jackson (Green's mother) answered and he asked for Green, identifying himself as "Junior." Through Jackson, he asked for a "50" - and a meeting was arranged.

When Green arrived at the meeting place, Johnson exchanged $50 for crack cocaine. At his request, Green then dropped him off a few blocks away. Jackson was not present. Green was not arrested at the time but the PD did a trash pull at Jackson's residence, a few weeks later. They found "baggies that appeared to have cocaine residue." They obtained a search warrant and when executing it, found Jackson asleep, with her husband, Duwayne. The officers found a purse on Jackson's side of the bed which contained crack cocaine, a digital scale and mail addressed to the Jacksons. A second purse contained Jackson's ID and cash. Additional baggies were found in the bedroom and more cocaine was found in the kitchen. Numerous baggies, with corners missing were found around the house.

Jackson denied that drug trafficking was occurring in her house; Duwayne admitted the baggies and marijuana found in the house were his. Jackson was indicted on trafficking charges and eventually convicted. She appealed.

ISSUE: Is it appropriate to refer to a defendant's prior criminal history?

HOLDING: No

DISCUSSION: Among other issues, Jackson argued for a mistrial after one of the officers mentioned her "prior jail file" and "previous history with the police." The Court agreed his statement was improper and offered an admonition, which the defense counsel refused. Since the Court had already decided to reverse the conviction on other, unrelated grounds, he chose to remind the parties that it was improper to refer to a defendant's prior criminal history, except under very specific circumstances.

Finch v. Com., 2009 WL 4251136 (Ky. 2009)

FACTS: Chambers was working as a CI for the Graves County Sheriff's Department. He worked with Det. Workman to set up a buy at Runyon's home – the detective searched him and gave him cash to buy crack cocaine. He was also fitted out with a recording device. When he got to Runyon's home, however, Runyon was not there – but Finch was. Finch offered to get him the cocaine. Finch left and returned a short time later with the drug.

Finch was indicted and convicted. He then appealed.

ISSUE: May a witness be impeached with a prior inconsistent statement of another witness?

HOLDING: No

DISCUSSON: Finch argued that the testimony given by Chambers at trial contradicted the testimony he gave at a preliminary hearing. However, the Court noted that Chambers' counsel was mistaken, as Chambers didn't testify at the preliminary hearing, only Workman did. The contradiction, if any, was between Chambers and Workman – and impeachment of one witness with the prior inconsistent statement of another witness is not allowed. Instead, "inconsistencies between different witnesses' testimony has to be shown by directly eliciting the varying and contradictory testimony of the witnesses." If Chambers had testified before Workman, it would have been permitted to point out the inconsistency and ask Chambers to explain it, although it is improper to flatly characterize the testimony of another witness as a lie.[69]

Finch's conviction was affirmed.

Fairchild v. Com., 2009 WL 2706989 (Ky. 2009)

FACTS: Fairchild was charged with complicity to murder, receiving stolen property and related charges. Baldridge was initially identified as the suspect in a Johnson County break-in that resulted in a death and he implicated Fairchild in the crime. Baldridge took a plea deal in which he agreed to testify against Fairchild. (Baldridge stated that Fairchild shot the victim and then instructed Baldridge to behead the victim, which he did not do.) Fairchild admitted to assisting with the stolen goods but claimed not to be present during the burglary.

Fairchild was convicted and appealed

ISSUE: May prior statements be introduced to refute contradictory statements?

HOLDING: Yes

DISCUSSION: Fairchild argued that prior consistent statements made by Baldridge were admitted at trial, but the evidence indicated that the information was introduced to rebut the assertion that Baldridge was given false testimony to support his own deal. The Court agreed that the testimony was appropriate for that purpose.

Fairchild's conviction was affirmed.

[69] See Moss v. Com., 949 S.W. 2d 579 (Ky. 1997)

Johnson v. Com., 292 S.W.3d 889 (Ky. 2009)

FACTS: Johnson was convicted of both rape and incest against his daughters, which involved multiple acts of sexual intercourse. He appealed.

ISSUE: Are multiple sexual acts of rape and incest a single continuing course of action, for double jeopardy purposes?

HOLDING: No

DISCUSSION: Johnson argued that charging him with both offenses, based upon a "single continuing offense," constituted double jeopardy. The Court, however, found that the offenses were not a single continuing offense, but instead, a series of individual acts that were each a separate offense. The Court also noted that the "crimes of rape and incest each require proof of a fact that the other does not," as "rape requires proof of age, whereas incest does not; incest requires proof of relationship, whereas rape does not."[70]

After resolving several other issues, the Court upheld his conviction.

Thorpe v. Com., Ky. App. 2009

FACTS: Thorpe (and her children) lived with her mother, Goldsmith, who has Alzheimer's disease. Thorpe took care of Goldsmith's prescriptions, which included one for Percocet. In September, 2007, Goldmsith left Maysville to live with her son in Lexington and the son had her prescriptions transferred. However, Thorpe asked the doctor to give her a new prescription for her mother, for the Percocet, and he contacted the Maysville PD. At their request, he agreed to give her the prescription, and when she arrived to pick it up, officers were waiting and arrested her.

At trial, Thorpe argued that she didn't know that Goldsmith wasn't going to return to Maysville. She was convicted and appealed.

ISSUE: Does the prosecution have a legal duty to disclose inculpatory statements it plans to use at trial?

HOLDING: Yes

DISCUSSION: At trial, the court permitted the admission of testimony from Thorpe's sister-in-law concerning a telephone call in which Thorpe begged Goldsmith to return to Maysville. At question was Thorpe's knowledge that her mother had permanently relocated to Lexington. The Commonwealth failed to furnish the defense with the information, as required under RCr 7.24(1). The prosecution argued that the information must be incriminating as the time it was made, not just as revealed to do so in the context of the trial. In this case, since what is issue was Thorpe's "*mens rea*,[71] whether she *knew* that her mother had *permanently relocated* to Lexington – and thus whether she intentionally concealed the change in circumstances from the doctor." However, the Court noted, the Commonwealth used "*that precise statement to incriminate Thorpe,*" and noted that the "contradiction is patent." "It went directly to the issue of mens rea, having the ability either to inculpate or to exculpate her." As such, the Commonwealth "had a duty to disclose its intent to use the statement."

[70] See Blockburger v. U.S., 284 U.S. 299 (1932)
[71] Mental state

The Court also disagreed with the trial court's admission of testimony concerning Goldsmith's poor physical condition when she arrived in Lexington, which might have proved highly prejudicial since she was charged with a crime related to that. That testimony might have "outweighed and overshadowed the scant evidence" of Thorpe's intent to fraudulently obtain a controlled substance. The Court agreed that some of such issues can be corrected by an admonition to the jury, but found in this case, "an admonition would have been insufficient to 'unring the bell' of inadmissible evidence." The Court found the trial to be fundamentally unfair and reversed her conviction.

Moore v. Com., 2009 WL 3406706 (Ky. App. 2009)

FACTS: Moore was indicted for driving a vehicle at a high rate of speed, through a checkpoint, on December 22, 2007, in Fleming County. Officers pursued. The driver was able to flee on foot but they were able to apprehend the passenger, Teter, who owned the vehicle. She was arrested and gave a statement that Moore was driving. However, that statement was not provided to the defense prior to trial, as required under the Kentucky Rules of Criminal Procedure 7.24 and 7.26. (After the Commonwealth was asked about it, it was learned that the county attorney was in possession of it.) However, since the defense counsel didn't ask for any particular relief, the judge took no action.

Moore was convicted and appealed.

ISSUE: Must oral inculpatory statements be provided to the defense?

HOLDING: Yes

DISCUSSION: The appellate court agreed that it was "clear that the Commonwealth failed to comply with the trial court's discovery order." However, the Court did not find that the defense was prejudiced by the error, and three officers also identified Moore as the driver. Further, defense counsel was aware of the statement "well before trial" – although they did not see it. "Considering these unique facts," the Court did not find reversal to be warranted.

Moore's conviction was affirmed.

Brown v. Com., 2009 WL 4723195 (Ky. App. 2009)

FACTS: Brown was convicted for trafficking on the basis of the testimony of an officer and a CI. The Officer, Det. Wright, (unidentified Wayne County agency), testified that a CI had to agree to certain terms, such as random drug testing, random searches, and agreeing not to use drugs. He would also check for local criminal activity information, but did not do a complete background check or see if the CI was considered truthful. Williams, the CI, came to Wright's attention, apparently because of her involvement with the Lake Cumberland Area Drug Task Force.

Williams made a buy of hydrocodone from Brown on September 14, 2006. She bought four pills with money provided by the officer. A recording was made of the transaction but it was "essentially inaudible." At trail, the detective admitted he had not asked Williams to undergo any drug testing nor did he search her residence. He did not do a strip search of her person and admitted that she could have hidden pills on her person. Williams testified that she had made buys for both Wright and the Task Force and that she "felt some pressure to act quickly because she thought delaying might jeopardize her deals" with both. Brown denied that Williams had approached him about buying drugs but that he refused.

Brown was ultimately convicted and appealed.

ISSUE: Is the issue of credibility of a witness a matter for the judge or the jury?

HOLDING: The jury

DISCUSSION: The Court began by noting that "judging the credibility of witnesses is a matter for the jurors, not for a court." There have been cases where a court has ruled upon the credibility of witness, but only when their "testimony asserted the occurrence of physically impossible or inconceivable events." The Court agreed that certain facts might "bring into question the veracity of Williams's testimony; however, they do not rob it of all credibility." The Court upheld the denial of Brown's motion for a directed verdict, and upheld his conviction.

Muncy v. Com., 299 S.W.3d 281 (Ky. App. 2009)

FACTS: At Muncy's trial for drug trafficking in Bell County, the Court permitted a detective to "assist in replaying portions of the recordings during jury deliberations." Muncy questioned the jocularity of the officer's interaction with the jury and that he was "laughing and joking with them." This behavior occurred in open court and was not objected to by Muncy's attorney. He was convicted and appealed.

ISSUE: Is jury interaction by an officer-witness improper?

HOLDING: Depends upon the circumstances

DISCUSSION: The Court looked to the case of Remmer v. U.S., the "seminal case on inappropriate juror contacts." However, it determined that since no private communication occurred, and there was no other conduct that was so troublesome that it unduly prejudiced the decision of the jury, it did not violate Mundy's rights.

Muncy's conviction was affirmed.

Singleton v. Com., 2009 WL 3321333 (Ky. App. 2009)

FACTS: In March, 2005, sections of copper guttering began to disappear from a Louisville elementary school. A school investigator discovered that Singleton has sold copper gutters to Freedom Metals during the relevant time frame. He asked the manager to let him know if Singleton returned with more copper. On Oct. 1, more guttering was stolen, and later that day, Singleton appeared at Freedom Metals. The investigator asked the manager to buy the metal and hold it for him. The school investigator (a sworn officer) and Officer Kessinger (Louisville Metro PD) went to inspect the copper. They arrested Singleton and took him to the station. (Officer Kessinger later stated that he didn't believe that an arrest warrant was served, but that Singleton was brought in on "open charges" and that he had to be interviewed before actual charges were filed.) Singleton waived his rights and gave a statement, claiming to have gotten the gutters from a man (Rob). The agreement was that Singleton would sell it and they would divide the proceeds. He admitted that he suspected the guttering has been stolen as he'd heard a reward had been offered relating to the theft.

Singleton was indicted on several counts of felony theft. He requested suppression of his statement, which the trial court denied. He was ultimately convicted only on two separate counts of receiving stolen property and related PFO offenses. He then appealed.

ISSUE: Must recovered stolen property be proved to actually be the stolen property in a specific case?

HOLDING: Yes

DISCUSSION: Singleton argued that the prosecution failed to present adequate proof that the copper guttering he sold was that stolen from the school. The Court noted that the question of the identification of copper had come up before, but in that case, the prosecution had produced details that linked the theft to the copper. In this case, however, despite the fact that the copper gutters had identification numbers, there was no attempt to compare or match that information with the guttering that remained at the school. There was also no attempt to match the amount stolen with the amount sold. The Court noted that it was within the "Commonwealth's ability in this case to determine the amount of stolen guttering and to ascertain any unique characteristics that would have connected the copper sold by Singleton to the copper stolen from" the school. In addition, no evidence (beyond hearsay) was presented as to the value of the guttering sold, to prove whether it was a felony. (A handwritten estimate by a third party was introduced by the investigator, but the Court ruled that was inadmissible hearsay.)

Singleton's conviction was overturned.

Warner v. Com., 2009 WL 3672887 (Ky. 2009)

FACTS: Warner was indicted in 2007 for a rape and burglary that occurred in Lexington in 1988. (Apparently a print recovered from the scene was matched to him in 2005.) In January, 2006, Lt. Curless got a search warrant to obtain DNA from Warner and he appeared on his own to provide the sample. Lt. Curless specifically told him he was not under arrest. (He was also given Miranda, but that would have been unnecessary.) He was allowed to leave following the interview. Warner moved for suppression, following his indictment and was denied. Warner was convicted and appealed.

ISSUE: May medical testimony be admitted in court?

HOLDING: In some circumstances

DISCUSSION: Warner argued first that testimony by the doctor who treated the victim should have been excluded at trial. (The elderly victim died before Warner's arrest.) The Court agreed, however, that the testimony was admissible under KRE 803(4), since the testimony related to what the victim told him and was for the purposes of medical treatment. The Court noted that the information from the victim was not legally "testimony" so the rules under Crawford[72] and Davis[73] did not apply in this case. Under such circumstances, state hearsay rules control. The Court agreed that Warner's "right of confrontation was not violated by allowing" the doctor's testimony. Warner also argued that the information he gave to Lt. Curless should have been suppressed. However, the Court agreed that although the officer was "trying to elicit information from Warner," the court found that the situation was not custodial. The Court noted that even though Warner contended that he said "he thought he needed a lawyer," just the "mere mention" of a lawyer "was not sufficient to require officers to stop questioning a suspect."[74]

Warner's conviction was affirmed.

[72] Crawford v. Washington, 541 U.S. 36 (2004)
[73] Davis v. U.S., 512 U.S. 452 (1994).
[74] Id.

Burress v. Com., 2009 WL 3526663 (Ky. 2009)

FACTS: On February 2, 2004, Det. Tucker (Campbellsville PD) met a CI to make a controlled buy of hydrocodone. The CI stated he'd bought the pills from a man he didn't know, at the house and that he'd seen him previously at the home. By checking the plates at the house, the detective was able to determine the subject was likely Burress. The CI later identified his operator's license photo.

Burress was charged with trafficking. He moved for suppression of the identification and was denied. He was convicted and appealed.

ISSUE: May evidence of a witness's lack of truthfulness be introduced to impeach testimony?

HOLDING: Yes

DISCUSSION: Burress first argued that he should have been permitted to cross-examine the CI about a pass conviction for giving a false name to a police officer. The trial court refused to allow the questioning, finding that it did not fall under KRE 609, and that "evidence of a witness' conviction for a crime could not be introduced unless it was a felony." Burress argued it should have been admitted under KRE 608(b) as it indicated he had a "character for untruthfulness." The appellate court agreed it should have been admitted, as the misdemeanor offense was directly connected to truthfulness. The case relied solely on the CI's testimony and his character was, therefore, material. As such, the error was not harmless and reversal was warranted.

Although the Court had already determined the case would be reversed, it discussed several other issues to provide guidance to the trial court. The Court reviewed the assertion that the photo identification was unduly suggestive, using the factors set forth in Neil v. Biggers.[75] The Court agreed that the CI could clearly see the person and that he paid attention. The description the CI provided matched Burress. The identification occurred shortly after the crime and the CI was confident in his identification. The Court found the identification reliable. However, the court agreed that it was inappropriate for the detective to testify that "the CI was a reliable informant whose work had resulted in numerous convictions," as that was inadmissible character evidence.

Burress's conviction was reversed and the case remanded.

NOTE: *Although the case did not reference Giglio v U.S.[76] directly, the concept that a witness's character for untruthfulness can be used to impeach their testimony flows from it. The Giglio doctrine may also be used to impeach the testimony of an officer - witness who has a history (criminal or otherwise) of untruthfulness. In addition, although it is critical to indicate such information as how a CI has been reliable in previous cases in a search warrant affidavit, it is inappropriate to mention that at trial, as it would be considered bolstering the witness's character.*

Coleman v. Com., 2009 WL 3526657 (Ky. 2009)

FACTS: On the day in question, Kenton-area police were dispatched to a 911 call "in which the caller alleged that an unidentified person was brandishing a gun." Chipman, at the scene, "urged them to hurry to the rear entrance, where they spotted [Coleman] through a window in the door and shouted at him to show his

[75] 409 U.S. 188 (1972).
[76] 405 U.S. 150 (1972)

hands." They saw him delay slightly, lean down and partially out of sight, and then raise his hands. They had the impression Coleman "had dropped something when he leaned down." The officers entered, handcuffed Coleman, and secured four other individuals in the apartment. They found a loaded gun (in a container) where Coleman had been standing. One officer picked up the gun and another unloaded it, with his bare hands. Coleman denied any knowledge of the gun.

As Coleman was a convicted felon, he was charged with possession of the gun. At trial, there was dispute as to why Coleman was at the apartment, and what had occurred there. Coleman was convicted and appealed.

ISSUE: May an officer repeat what a non-testifying witness said during testimony?

HOLDING: No

DISCUSSION: Coleman argued that he was denied his right to confront witnesses when the court allowed for "various hearsay statements of persons present in the apartment through a police officer" in violation of Crawford v. Washington.[77] The opinion recited at length several instances of such testimony. In summary, the officer repeated "several hearsay statements during the course of his testimony: that [Coleman] had a gun, that [Coleman] pointed that gun at multiple people, that [Coleman] was angry and shouting." The statement concerning the gun was "repeated multiple times."

The Court noted:

> The rule from Crawford … is simple: "a witness's testimony against a defendant is … inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross examination."[78] Under this rule, the statements admitted against [Coleman] are paradigmatic violations of the Confrontation Clause. First, the witnesses did not give testimony at trial. Second there is no indication that the witnesses were unavailable; in fact, it appears from the record … that the witnesses were present in the courthouse under the prosecution's subpoena, but simply were not called to testify. Third, the statements were untested by cross-examination.
>
> The only question then is whether the statements were testimonial. The statements in this case clearly were. Statements made in response to police questioning following a crime are testimonial in nature.

The Court reached the only possible conclusion - that Coleman's rights were violated. Further, the "very point of Crawford is that confrontation bars the introduction of a witness's statements through other witnesses in lieu of direct testimony." If the witnesses are available, it is the responsibility of the prosecution to call them to the stand and "directly elicit their testimony."

Finally, since the evidence against Coleman was scant, otherwise, without the hearsay statements it is certainly reasonable that a jury would not have convicted. Coleman's conviction was reversed.

[77] 541 U.S. 36 (2004).
[78] Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009)

Jackson & Moffett v. Com., 2009 WL 3526653 (Ky. 2009)

FACTS: Jackson and Moffett were members of a group that were involved in robberies and burglaries in the Louisville area, in 2005. During one of the burglaries, a woman was raped and sodomized. Both men were tried together; other members of the group took pleas and testified against the pair. They moved to sever their trial, arguing that the prosecution would "introduce statements of codefendants in violation of Crawford v. Washington."[79] The trial court ruled that the statements could be "sufficiently redacted in accord with Richardson v. Marsh."[80]

At trial, both were convicted on a multitude of charges and appealed.

ISSUE: Does a redacted statement violate Crawford?

HOLDING: No

DISCUSSION: Jackson argued that the "introduction of redacted statements made during a police interrogation" of Moffett was improper. He also contended it was improper to allow "other codefendants" "to testify about statements Moffett made to them." He claimed that "redacting the testimony of a non-testifying codefendant is not a valid substitute for confrontation and cross-examination" and that Crawford "implicitly overrules Richardson.

The court noted that Bruton v. U.S. held that "in a joint trial, the confession of one codefendant, which implicates both defendants, may not be introduced despite the court's limiting instruction that the confession be considered only against the confessing defendant."[81] Richardson modified that rule, finding that actual redaction could be used. However, the Court was "left with the issue of whether Crawford forbids the introduction of a redacted statement in compliance with the Richardson guidelines." The Court looked to other circuits, and to the Kentucky decision of Rodgers v. Com. to conclude that redaction is a sufficient way to avoid "any Sixth Amendment or Bruton violation."[82] The Court analyzed the various statements, and ruled that all were properly admitted.

Jackson also argued that a number of charges were presented against him "without victim testimony" at all. Sixteen of the victims "had their identities established solely through the testimony of police officers." The Court, however, disagreed "that the officers' testimony should be barred on either confrontation or hearsay grounds." The Court noted that the "Confrontation clause does not bar the use of testimonial statements for the purpose other than establishing the truth of the matter asserted."[83] The Court noted that in each case where "the victim's identity was established solely through police testimony, the Commonwealth introduced ample evidence to support each count."

After addressing a number of other issues, the Court upheld their convictions.

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[79] Supra.
[80] 481 U.S. 200 (1987).
[81] 391 U.S. 123 (1968).
[82] 285 S.W.3d 740 (Ky. 2009).
[83] Tennessee v. Street, 471 U.S. 409 (1985).

Todd v. Com., 2009 WL 3526650 (Ky. 2009)

FACTS: On the day in question, Monjure was strangled to death in Woodford County and her friend, Patricia, with whom she was living, was stabbed in the neck with a barbecue fork. Both Patricia and another witness eventually identified Todd as the assailant and picked him out of a photo array. Det. Thompson had developed Todd as a suspect and had recovered a pair of shorts from his home. Todd's wife had also given her a bloody tee-shirt she had found in the washing machine. Blood testing linked him to Patricia's assault.

At trial, he claimed that he had been present and had sex with Monjure, but that another man had committed the assaults. He fled because he didn't want to be blamed. Todd was convicted and appealed.

ISSUE: May hearsay be presented to explain why an officer took a specific action?

HOLDING: Yes

DISCUSSON: Todd complained about the admission of several hearsay statements made by another witness in the house. The witness, although 19, had Down's Syndrome. Allegedly, the witness gave Todd's name to the detective. Her recorded statements were not admitted, but the officer referenced them in her testimony. Prior to the trial, it was agreed that the statements would not be admitted, and that the name would only be brought in to explain why Det. Thompson focused on Todd. When the statements by that witness were blurted out by Patricia, the Court offered an admonition to the jury.

The Court concluded that the matter was handled properly and upheld Todd's conviction.

NOTE: *Although this case was not reversed, officers are strongly cautioned against the use of hearsay, and any such statements should be cleared by the prosecutor before testimony.*

Ashley v. Com., 2009 WL 3785848 (Ky. App. 2009)

FACTS: Ashley stood trial for Rape and Sodomy, both in the third degree, for his actions while an elementary school teacher in Harlan County. His victim was a 14-year-old, 8th grade student. He was ultimately convicted, and appealed.

ISSUE: Is a victim's journal admissible as a present sense impression?

HOLDING: No

DISCUSSION: Ashley objected to the introduction of certain emails sent from an anonymous account which did not actually connect with Ashley. The victim testified that she received them from Ashley and that he "acknowledged to her that he sent them." The emails were actually not admitted by the court, but the jury was exposed to them during an accidental showing to the jury of the testimony of a witness, that also picked up the bench conferences during which the judges and attorneys discussed the emails at length. The Court agreed that alone was sufficient to overturn the conviction. (One email that did include Ashley's name as the sender was properly admitted.)

The Court also considered whether other items were improperly admitted, including the victim's journal which detailed the sexual abuse. The Court found that the journal was not admissible as a present sense impression under KRE 803(1) because of the lapse in time between the occurrence and the victim's writing in the journal. The Court did agree that testimony from another female student concerning Ashley's conduct towards her,

which was very similar to the way he interacted with the victim in this case, was admissible as a "prior bad act" under KRE 404(b)(1).

The Court reversed Ashley's conviction and remanded it for a new trial.

Skaggs v. Com., 2009 WL 1830807 (Ky. 2007)

FACTS: Skaggs was involved with Boyd in the repossession of a vehicle in Elizabethtown. Later in the night, after disputed events, Skaggs took Boyd to the hospital and she was "declared dead from multiple blunt force head injuries and ligature strangulation." Skaggs was interviewed twice and eventually indicted, in March, 2005, of Boyd's murder. The Commonwealth prosecuted under the theory that Skaggs had fabricated a story of an abduction to conceal the murder. He was convicted and appealed.

ISSUE: Does returning a stolen vehicle to its rightful owner, thereby preventing a suspect from investigating it for evidence, require a missing evidence instruction?

HOLDING: No

DISCUSSION: The Court noted that, after interviewing Skaggs, officers obtained a search warrant for the van he was driving. They found a "significant amount" of blood on both the inside and outside of the van. The vehicle was taken to the Eliazbethtown PD office for further examination. Four days later, KSP thoroughly examined the van and collected a great deal of evidence. The vehicle was then returned to its owner, the company for which Skaggs worked. Skaggs argued that returning the vehicle "essentially destroyed" evidence before he had an opportunity to examine it and had requested a "missing evidence" instruction. The Court had refused his demand and specifically found "there was no bad faith on the part of the police in giving the van back to the company." The Court agreed that the "intentional destruction of exculpatory evidence" is a Due Process violation that required either dismissal of the case, exclusion of the Commonwealth's evidence or a missing evidence instruction.[84] In Estep v. Com., the Court clarified what constitutes a Due Process violation and when a "missing evidence" instruction is warranted:

> First, the purpose of a "missing evidence" instruction is to cure any Due Process violation attributable to the loss or destruction of exculpatory evidence by a less onerous remedy than dismissal or the suppression of relevant evidence. . . . Second, the Due Process Clause is implicated only when the failure to preserve or collect the missing evidence was intentional and the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed. None of the above precludes a defendant from exploring, commenting on, or arguing inferences from the Commonwealth's failure to collect or preserve any evidence . It just means that absent some degree of "bad faith," the defendant is not entitled to an instruction that the jury may draw an adverse inference from that failure.[85]

At a hearing, Det. Norris (KSP) stated that it is procedure to return such property to its owner and it is decided on a case by case basis. In this case, the company needed the vehicle to conduct its business. In this case, the Court found that there was no bad faith and that he wasn't entitled to either exclusion or an instruction.[86]

Skaggs' conviction was affirmed.

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[84] Sanborn v. Com., 975 S.W.2d 905 (Ky. 1998),
[85] 64 S.W.3d 805 (Ky. 2002).
[86] See also Coulthard v. Com., 230 S.W.3d 572 (Ky. 2007).

Stanley v. Com., 2009 WL 1348157 (Ky. App. 2009)

FACTS: Stanley was arrested and tried for Complicity to First-Degree Robbery. At trial, the investigating detective testified as to the "statements made by the victim." She was convicted and appealed.

ISSUE: May an officer testify as to what an informant told him?

HOLDING: No

DISCUSSION: The Court noted that the only witness during the case in chief was the detective. He testified as the robbery of one of his informants, who was identified by name. When he questioned Stanley about the alleged robbery, she produced a knife which was apparently the weapon used in the robbery. She also confessed. Stanley argued that the detective was improperly permitted to testify as to what the informant told him, which constituted hearsay. (She also argued that her confession was uncorroborated, if that statement was excluded, under RCr 9.60, but the Court elected to rule on the hearsay issue and found that dispositive. The Court did agree, however, that had it not already planned to overturn the conviction on another issue, that the confession would have been excluded.) The Court addressed the issue as one that falls under Crawford v. Washington[87] and its progeny, and agreed that the detective's testimony was hearsay. As such, the testimony should have been excluded, and without that testimony, "the evidence presented by the Commonwealth lacked the corroboration necessary under RCr 9.60 to withstand the directed verdict motion" made by Stanley.

Stanley's conviction was reversed.

Tate v. Com., 2009 WL 1451928 (Ky. 2009)

FACTS: Tate was charged with rape and sexual abuse based upon allegations by his stepdaughters - E.G. and D.F. The Court in that case issued an order requiring that the Commonwealth was to provide any statements from any witnesses to the defense, at least 60 days in advance of trial, "if the statement is in the form of a document or recording in its possession which relates to the subject matter of the witness' testimony." In addition, the order required the production of any exculpatory evidence. The Commonwealth provided notes from interviews from the two girls but did not provide the "actual video-recorded statements."

A few weeks prior to trial, Tate requested copies of the tapes. On the first day of the trial, he "complained that the video copies provided by the Commonwealth were of poor audio quality and he requested new copies." Two days later, the statements were provided on DVD. Two days after that, when the jury was seated, Tate requested dismissal, "arguing that the Commonwealth violated the Order regarding discovery." The trial court denied Tate's motion for dismissal, finding no reason to believe that the information concerning the statements was not in the material that was provided earlier, negating any element of surprise. His motions were denied and he was convicted,. He then appealed.

ISSUE: Is a defendant entitled to discovery in a timely manner, prior to trial?

HOLDING: Yes

DISCUSSION: Tate argued that he was prejudiced by the late discovery and that he believed they contained exculpatory evidence. The Commonwealth contended that Tate "knew of the existence of the video-recorded

[87] 541 U.S. 36 (2004).

statements … due to the written discovery turned over in March 2007" - some six months prior to the trial date. The Commonwealth stated "that it is not their protocol to make copies of video-recorded statements for the defendant until they are requested by the defense." The Court agreed "that the Commonwealth did not violate the Order by not turning over the victims' video-recorded September 2006 statements prior to sixty days before trial." The Court disapproved of the Commonwealth's stated reasons for its "protocol" - that directly contradicted the judge's order. However, the Court also disapproved of Tate's tactic to wait until the jury was impaneled (thus invoking double jeopardy) to raise the issue, particularly since he had notice of the existence of the recordings some six months earlier, and had copies, albeit apparently faulty ones, two weeks prior to the trial. Further, Tate could have asked for a continuance to review the tapes, but did not do so.

Tate's convictions were affirmed.

Mills v. Com., 2009 WL 1705605 (Ky. App. 2009)

FACTS: Mills allegedly stole a vehicle in July 25, 2006. The vehicle turned up in early September, having been involved in a collision in Monroe County. Several nearby residents responded to the crash to offer assistance, and one recognized Mills. Several witnesses stated they did not know if Mills, who was staggering and stumbling was drunk or had been injured in the crash. However, Mills managed to leave the scene. The driver of the other car died in the crash. Trooper Dubree (KSP) found a cell phone at the scene and linked the phone to Mills's mother. Mills was arrested two days later at his mother's residence. He was taken to the hospital and he told the nurse that he'd been involved in a wreck two days before. The Trooper interviewed him at the hospital, and he admitted having been in the wreck and having left the scene. He denied having been drinking that night, however.

Mills was indicted on a variety of charges, including "murder by use of motor vehicle", theft, assault and DUI. He was ultimately convicted of Manslaughter in the Second Degree, DUI and related charges. He appealed.

ISSUE: Is it up to the jury as to which expert to believe?

HOLDING: Yes

DISCUSSION: Mills argued that the prosecution's theory that he had failed to yield to the other car was supported by Trooper Young, "who had very little experience to that of his expert," who testified otherwise. The Court, however, noted that it was up to the jury to decide which expert to believe, and the trooper was corroborated by the surviving passenger in the vehicle struck by Mills.

Mills's conviction was affirmed.

Hines v. Com., 2009 WL 874512 (Ky. App. 2009)

FACTS: Hines was charged with the rape of R.C., age 15. At trial, Det. Hammon (KSP) among others, was permitted to testify concerning prior consistent statements made by the victim. Hines was convicted and appealed.

ISSUE: Is it error to comment on a subject's refusal to consent to a search?

HOLDING: Yes

DISCUSSION: KRE 801A(a)(2) prohibits the admission of testimony "merely to bolster a witness." The Court

agreed that the admission was improper, but because it had not been objected to at trial, different rules of court stated that the injustice must be manifest in order for the verdict to be overturned. The Court agreed that the admission did not seem to substantially affect the result of the trial. In addition, with respect to Det. Hammond's testimony that he could not get a pubic hair analysis because Hines's refused, the court noted that no warrant or court order was ever requested to obtain such samples. The Court agreed that Hines had a legitimate right to refuse consent to a warrantless search and that it was improper to present his refusal as evidence of guilt.

Although each of the errors in the trial might not have risen to the level of manifest injustice, the Court agreed that the cumulative effect was sufficient to want the overturning of Hines's conviction.

Boyd-Mahmoud v. Com., 2009 WL 960721 (Ky. App. 2009)

FACTS: The facts of the case revolve around a lengthy custody battle originating in Hardin County. It culminated in the prosecution of Boyd-Mahmoud for custodial interference. During the trial, the Court permitted the introduction of a polygraph taken by Mohey (the child's father) which indicated he did not sexually abuse the child. Boyd-Mahmoud was convicted and appealed.

ISSUE: Is it error to admit the results of a polygraph that indicated a third party did not do something?

HOLDING: Yes

DISCUSSION: The Court noted that the results of the polygraph were admitted to refute Boyd-Mahmoud's claim that she fled the state because of Mohey's sexual abuse of their daughter. The Court agreed that as a rule, such results were not admissible in Kentucky courts. The Court, however, agreed that it was error to allow the introduction of the polygraph results in this instance. The Court found that "the ban on introducing such evidence remains strong and uncorrupted in Kentucky" because "[p]olygraph exams are considered too unreliable for any purpose and simply too prejudicial to be admitted."

The Court reversed the conviction.

Bowling v. Com., 2008 WL 4291670 (Ky. 2009)

FACTS: Bowling was charged in two separate murders, both which occurred during gas station robberies. In each case, the victims were shot. He was convicted and sentenced to death, but sought numerous appeals.

ISSUE: Is CBLA evidence reliable?

HOLDING: No

DISCUSSION: At trial, the court permitted testimony from an FBI expert concerning the "chemical composition of bullets found at all three gas stations with bullets found at Bowling's residence, a process known as CBLA (comparative bullet lead analysis)." That testimony indicated that all three bullets were identical in composition. However, since that trial, the "reliability of CBLA has been seriously undermined." The Court noted, however, that the CBLA evidence was simply cumulative and that there was also proof that all of the bullets were fired from a gun recovered at another location, a gun that was also strongly linked to Bowling.

The Court affirmed Bowling's conviction.

Searight v. Com., 2009 WL 1108862 (Ky. 2009)

FACTS: On May 16, 2007, Sgt. Combs (Lexington PD) "observed [Searight] leaning into a vehicle that was stopped in the road and blocking traffic." He later testified that he saw Searight "reach into the vehicle and draw his hand back out, holding a small object." Sgt. Combs activated his emergency equipment, opened his door and "called over" to Searight. Searight fled, and Sgt. Combs pursued him on foot, "across two parking lots and over multiple fences but eventually lost sight of him." Searight was finally found hiding in a nearby trash can, was arrested and searched. Officer Burnette did a pat-down, and found nothing. Searight was wearing only baggy shorts and shoes at the time. Burnette was then secured in the back of Burnette's car.

The Court noted:

> The car had been detailed and vacuumed earlier that day and no one else had been in the back seat since the cleaning. While sitting in the car, [Searight] began moving around in an unusual manner, lifting himself off the seat. The officers became suspicious and removed [Searight] from the car for another search. When he exited the vehicle, the officers noticed a bag containing 683 milligrams of cocaine lying on the seat. [Searight] immediately denied possession of the bag. The officers did not observe any hair or residue on the bag.

Searight was indicted on charges relating to the drugs, and he was eventually convicted. He then appealed.

ISSUE: Is testifying concerning non-indicted offenses improper?

HOLDING: Yes

DISCUSSION: Searight argued that he should have received a mistrial because Sgt. Combs testified that he charged Searight with trafficking in crack cocaine, since the grand jury declined to indict on that charge. As such, he argued that the "jury had been tainted and that he had been harmed irreparably by the testimony." The Court had refused his objection at trial, instead giving an admonition to the jury to consider only the charges for which he was actually standing trial. The Court found "no reason why the jury would have been unable to follow the trial court's admonition."

After resolving several other issues, the Court upheld Searight's conviction.

Harris v. Com., 2009 WL 1108860 (Ky. 2009)

FACTS: On Sept. 14, 2006, in Kenton County, Harris sexually assaulted and impaled his girlfriend, Karen, with a broom handle, causing horrific internal injuries. Harris claimed the impalement was an accident. During the course of the trial, Hundley, a sexual assault nurse examiner (SANE) testified that she interviewed Karen about her injuries, some hours after the fact, and after treatment had begun. Her testimony was admitted and eventually Harris was convicted. He then appealed.

ISSUE: May a medical professional testify as to statements by a victim, unrelated to their medical treatment?

HOLDING: No

DISCUSSION: Harris argued that the statements made by Karen to Hundley "were inadmissible under KRE 803(4) because the identity of her assailant was unnecessary for her medical treatment." As such, its admission was error. However, because Karen testified at trial, herself, as to the identity of her assailant, its admission was considered harmless.

Harris's conviction was affirmed.

Muquit v. Com., 2009 WL 961126 (Ky. App. 2009)

FACTS: Muquit was convicted of first-degree rape, first-degree burglary and other charges, in Kenton County. He was convicted, and appealed.

ISSUE: Is an inconsistency between testimony and reports fatal to a case?

HOLDING: Not necessarily

DISCUSSION: Muquit argued that there was an inconsistency between the victim's statements, the police reports and the actual charges. Specifically, the initial police report indicated that the victim stated that her "assailant 'was unable to maintain and erection and therefore did not penetrate her …." At trial, however, the victim stated there was slight penetration, thereby justifying the rape charge. (Muquit was also charged with sodomy, but was acquitted of that charge.) For strategic reasons, however, his counsel chose not to impeach the victim's testimony with her prior inconsistent statement. He did, however, question Det. McGuffey about it, as he also changed his testimony between the preliminary hearing and the grand jury, as well, apparently in accord with the victim's change.

The Court, however, noted that the change was nothing "more than a clarification due to further investigation" and that there was "no evidence of perjury."

Muquit's conviction was affirmed.

Freeman v. Com., 2009 WL 875446 (Ky. App. 2009)

FACTS: Freeman and Thomas (his girlfriend) were indicted on a variety of drug charges, resulting from a search of their McCracken County apartment. (Freeman gave consent to search after Thomas was arrested in another state for trying to buy methamphetamine.) The Commonwealth gave notice (pursuant to KRE 404(b)) that it would seek to introduce evidence of their trip to "prove motive, opportunity, intent, preparation, plan, knowledge, or identity, or absence of mistake or accident." Freeman's defense was that he did not know the drugs were at his home and he moved to restrict the admission of such evidence. The trial court allowed the evidence to be admitted and Freeman was convicted. He then appealed.

ISSUE: Is evidence indicating someone's knowledge admissible?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court noted that such evidence is admissible "if offered not to show a defendant's propensity to commit a crime, but for some other purpose such as knowledge." To prove Freeman's complicity, it was essential that the Commonwealth prove "intent and knowledge" on his part.

The Court found no error in its admission, and upheld the conviction.

OPEN RECORDS

Marshall County, Kentucky (E-911 Division); v. Paxton Media Group, LLC D/B/A WPSD-TV, 2009 WL 153206 (Ky. App. 2009)

FACTS: The parties stipulated that on September 12, 2006, the Marshall County Sheriff's office responded to a 911 call alleging that shots had been fired in a residence on Cumberland Road in Gilbertsville. The bodies of an estranged married couple were found at the residence. On September 13, WPSD-TV identified the deceased and reported that the deaths apparently resulted from a murder/suicide. However, the sheriff's office declined to identify a third person who was in the house but not a suspect in the deaths. The next day, WSPD requested a copy of the 911 call from the Marshall County 911 agency, and the County Attorney (on their behalf) denied it, stating that its "disclosure would constitute a clearly unwarranted invasion of personal privacy as defined in Bowling v. Brandenburg," [88]

WSPD filed an action. The trial court rejected Marshall County's claim that Bowling creates a blanket exemption for the nondisclosure of 911 tapes," and "granted WPSD-TV's motion for summary judgment." Marshall County was ordered to comply with the open records request. Marshall County appealed.

ISSUE: May a dispatch agency be required to release a 911 tape under Open Records?

HOLDING: Yes

DISCUSSION: "First, Marshall County asserts that the trial court erred by failing to find that KRS 61.878(1)(a) and Bowling preclude public disclosure of a copy of the 911 call.

The Court disagreed, ruling that:

> Kentucky's Open Records Act is set out in KRS 61.870 to KRS 61.884. KRS 61.878(1) provides in pertinent part: The following public records are excluded from the application of KRS 61.870 to 61.884 and shall be subject to inspection only upon order of a court of competent jurisdiction . . . :
> (a) Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy;
> . . . .
> (l) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly[.]
>
> KRS 61.878(4) directs that "[i]f any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination."

The Court stated that:

[88] 37 S.W.3d 785 (Ky.App. 2000).

> [It was] not persuaded by either claim since here, unlike Bowling, the 911 caller was neither an alleged victim of domestic violence nor subject to future threats from the alleged domestic violence perpetrator. Possibly, speculation regarding the victim's relationship with the caller may subject the caller to some embarrassment in the community. However, that fact alone is insufficient to prevent the release of the requested 911 call information, as being of such a personal nature as to amount to an unwarranted invasion of personal privacy, especially since the record shows that even before the information was formally requested by WPSD-TV, the caller was identified publicly by name through other sources.[89]
>
> Moreover, although as in Bowling no criminal charges resulted from the 911 call, the situations are not comparable since the absence of charges below reflects only on the fact that the alleged perpetrator was dead, and not on the absence of evidence to support a prosecution of a viable claim against a living defendant as in Bowling. The caller's privacy interest and possible desire to avoid embarrassment therefore did not lessen the public's right to know the contents of the 911 tape recording, and the release of the record of the call was not prohibited on this ground.

The Court also ruled that although Automatic Location Information (ALI) could not be revealed, under KRS 65.752, that was not a bar to releasing the remainder of the information. If the record would contain such information, it could simply be redacted.

The decision of the trial court, ordering the release, was upheld.

CIVIL

Morgan v. Bird, 289 S.W.3d 222 (Ky. App. 2009)

FACTS: In April, 2007, Bird reported actions of her neighbors (the Morgans) that she believed constituted child abuse and neglect - specifically, she observed their toddler drinking from a beer can. The observation triggered an angry reaction from the neighbor. Bird contacted her son, Officer Bird (Williamsburg PD) and reported what had occurred. Officer Bird contacted CHFS and he and the social worker (Bryant) arrived within the hour. Both investigated the incident, and during the course of the investigation, Officer Bird followed Felicia Morgan (the child's mother) and Bryant into the house, and eventually into the bedroom. Bryant noticed a pill bottle with a scratched off label and he was told conflicting stories about what it contained. Eventually, Bryant decided to place the child with a grandmother while the parents obtained drug tests. Eventually, after passing tests and agreeing to a child "plan," the couple regained custody of the child.

The Morgans then sued all parties involved, as well as the City of Williamsburg, alleging that the child was removed from their home based upon a "false, unsubstantiated report" and that such actions violated various rights. The trial court dismissed the action and the Morgans appealed.

ISSUE: Is a good faith report of child abuse protected by immunity?

HOLDING: Yes

[89] Palmer v. Driggers, 60 S.W.3d 591, 598 (Ky.App. 2001).

DISCUSSION: First, the Court addressed the immunity provisions in KRS 620.030, which provides for both the requirement to make a report when a child is being abused or neglected, and provides for immunity for an individual who, in good faith, does so. The Court found no reason to doubt that Bird acted in good faith or that Bird lied about what she saw. Her report to her son, a law enforcement officer in the jurisdiction, was also proper under the statute. Further, the Morgans assert that Officer Bird "acted in bad faith by not investigating the alleged bad faith report of neglect … before reporting it to CHFS and that the City and its Council members were negligent in supervising and training Officer Bird." The Court quickly agreed that the officer "properly followed the guidelines outlined in KRS 620.030 for reporting a claim of neglect to CHFS." The Court further noted that Bird did not illegally search the Morgan home, as alleged, but instead simply followed the social worker through the home. His observations did not factor into Bryant's determination to seek a temporary alternative placement for the child. In fact, the Court noted the "prompt investigation and replacement of the child at issue in the instant case was a well executed illustration of the intent and framework of KRS 620.030."

The Court upheld the dismissal.

EMPLOYMENT

Cromer v. Lexington-Fayette Urban County Government, 2009 WL 961102 (Ky. App. 2009)

FACTS: Cromer was dismissed for misconduct as a Lexington police officer in 2007. He appealed that action, arguing violations of KRS 95.450 and KRS 15.520, which provides "administrative due process protections in connection with a disciplinary proceeding."

ISSUE: Must KRS 15.520 and KRS 95.450 be read together?

HOLDING: Yes

DISCUSSION: Specifically, Cromer argued that the charges against him should have been dismissed because he was not provided a hearing before the Council within sixty days of the Form 111 complaints. (Apparently that form was the document used by Lexington police in making such charges.) The Court reviewed the provisions of KRS 15.520(1)(h)(8) and how it interacts with KRS 95.450, which applies to urban-county governments (Lexington-Fayette County Urban County Government). Since both apply, the Court reasoned, a proper reading "may only be obtained by juxtaposing these two statutes." Under 15.520, an "officer must be given a hearing within 60 days of being suspended and upon a 'charge being filed.'" He claimed that the charge was filed when he was served with the Form 111 complaints, which, although it does not include the word "charge" does serve as charging documents to initiate discipline. However, the Court noted, although 15.520 does not elaborate upon how charges are to be filed, KRS 95.450 does, and requires that such charges be filed with the "clerk of the legislative body." Because his hearing did occur within 60 days of that occurrence, the Court agreed that his hearing was timely.

Further, Cromer argued that Charges I-VII were initiated as the result of Form 111s filed by two specific officers, who were not summoned to the hearing. (Under 15.520, that would require the dismissal of such charges.) The Court however, noted that although they were not officially notified, they were both present, and the Court agreed that dismissal was not warranted. Finally, Cromer argued that Charge VIII, which related to insubordination, should have been dismissed because the agency did not comply with KRS 15.520(1) during his interrogation, which occurred while he was on FMLA leave, and in which he did not receive a 48 hour notice. Instead, he was contacted verbally and ordered to appear for an interrogation the same day. The Court, however, noted that the statute did not mandate dismissal, but instead permitted the

exclusion of the information gained if the officer was materially prejudiced. In this case, the Court found no reason to find that was the case.

After addressing several other issues, the Court upheld Cromer's dismissal.

Waters v. City of Pioneer Village, 299 S.W. 3d 278 (Ky. App. 2009)

FACTS: Waters was hired as a police officer for Pioneer Village and signed a contract to the effect that he would stay for two years starting from his academy completion date. The contract provided that if he breached the contract, he would be expected to repay what it cost the city to send him to the academy, as well as other undefined costs.

Waters graduated on July 2, 2004 and became a park ranger with the Kentucky Department of Parks on December 13, 2004. Pioneer Village sued both Waters and the Dept. of Parks for approximately $15,000 under KRS 70.290. Parks was dismissed because as a state entity it was entitled to sovereign immunity. The case was transferred from Franklin to Bullitt County and tried, but Waters did not appear. The judgment was set aside on his assertion that he was not given notice of the suit, but eventually the Court rendered judgment for Pioneer Village. Waters appealed, arguing that the statute does not permit reimbursement to be sought from him personally (but only from his employing agency) and that the amount was not correctly calculated.

ISSUE: May an officer be required to pay back an employment contract, if their new employing agency is exempt from suit?

HOLDING: Yes

DISCUSSION: The Court reviewed the statute, and noted that as yet, there had been no case law to interpret it. To construe a statute, the court must be "guided by the two paramount rules of statutory construction, that is, that words must be afforded their plain, commonly accepted meaning and that statutes must be construed in such a way as to carry out the intent of the legislature." Since Pioneer Village could not seek reimbursement from Parks, if the court construed that its exclusive remedy was against the employing agency, it would be left with no way to "recover its investment in Waters." The Court found that interpretation to not carry out the intent of the legislature to allow agencies to recoup training costs.

The Court also found that the City had presented adequate evidence to support the amount it claimed in training Waters. The Court upheld both the verdict and the judgment amount.

WORKER'S COMPENSATION

Estes (Ricky & Donna) v. Thompson & Caudill, 2009 WL 3047600 (Ky. App. 2009)

FACTS: On October 29, 2006, the Clark County Sheriff's Office got an emergency call from Powell County, alerting them to a vehicle on the Mountain Parkway. The occupants had been involved in an armed robbery in Powell County. Deputies Estes (a full-time deputy) and Thompson (an unpaid special deputy) responded in separate vehicles. The deputies met in the median of the Mountain Parkway and proceeded, running lights and siren, to try to locate the suspect vehicle. Estes spotted two vehicles on the side of the road, with emergency lights flashing, and he slowed, but he realized that wasn't the correct vehicle. However, Thompson, who was behind him, didn't realize that Estes was driving so slowly and struck him from the rear. Both men were badly injured.

Both men received worker's compensation benefits. Estes and his wife, however, sued Thompson, Sheriff Perdue and Caudill, the previous sheriff (who was sheriff at the time of the wreck), for negligence and related causes of action. The trial court dismissed all claims because of the exclusive remedy provisions of KRS 342.690 (worker's compensation). Both Ricky and Donna Estes appealed.

ISSUE: Is a special deputy an employee for worker's compensation purposes?

HOLDING: Yes

DISCUSSION: Estes argued that Thompson could not be considered an employee under worker's compensation and that even if special deputies could be so classified, that Thompson's appointment was invalid. The Court, however, quickly ruled that since the statute specifically includes "volunteer police," that it was correct to classify Thompson as an employee under the act. The Court noted that one of the tests was whether the employer had taken out insurance on the volunteers, and in fact, that had been done in this case. (KACo, the insurer, paid the benefits to Thompson without question.)

With respect to the validity of the appointment, Estes argued that Clark County exceeded the statutory maximum for such deputies and did not meet the Clark County requirements, either. However, the record indicated that there were no more than 14 special deputies on the books at the time and that was the number permitted based upon the population of the county. With respect to training, the sheriff had a draft proposal, and "[e]ven so, Estes cannot establish any requirement under KRS 70.045 that, in order to be a deputy sheriff, one must complete a certain amount of training." Finally, the Court ruled that both men were within their scope of responsibility in looking for the suspect vehicle. In addition, since there was no assertion that Thompson intended to injure Estes, he was protected from liability, as negligence does not invalidate the exclusive remedy defense.

The Court upheld the dismissals.

MISCELLANEOUS

Tobar v. Com., 284 S.W.3d 133 (Ky. 2009)

FACTS: Tobar was charged with violating the Kentucky sex offender registry, by failing to notify Kentucky of his address change. Through a combination of circumstances, Tobar had become homeless - and did not notify his probation officer that he had left his previous place of residence.

Eventually, he was indicted, and moved to suppress the indictment because, he argued, he could not register a change in address when he had no address. The trial court denied him, but allowed him to take a conditional guilty plea and appeal.

ISSUE: Must a homeless sex offender register as to their homeless status?

HOLDING: Yes

DISCUSSION: Tobar argued that the statute was "void for vagueness" as it gave no guidance to individuals in his situation. The Court, however, ruled that the statute was not vague, but required only that an individual must report a change in location. Since he didn't at least attempt to report, he could not raise an "impossibility"

defense. The Court noted that the statute had changed somewhat since this case arose, and declined to opine upon how the changes might have changed their opinion.

Tobar's plea was affirmed.

Com. v. Lopez, 292 S.W.3d 878 (Ky. 2009)

FACTS: Lopez with charged with violations of the Uniform Code of Military Justice (UCMJ) while in Iraq; he had been found guilty of viewing child pornography. He was, at the time, on probation in Kentucky for attempting to commit sexual abuse. In lieu of court-martial, he took a voluntary discharge. Once he returned to Kentucky, his probation was revoked and he appealed. He had admitted only to viewing adult pornography, which was also a violation of military rules. The Court of Appeals overturned the decision, and the Commonwealth appealed.

ISSUE: Nay violation of a serious military rule triggers a state probation revocation?

HOLDING: Yes

DISCUSSION: The Court began by noting that "probation revocation is not dependent upon a probationer's conviction of a criminal offense." All that was required was evidence that he violated the terms of his probation, and found it of no consequence that he was discharged from the Army in lieu of conviction. The admission of violating a military rule was sufficient. (The Court did agree that certain military rules might not warrant revocation, but found that would be judged on a case by case basis.)

In this case, given the close connection to the offense for which he was on probation, the Court agreed his revocation was appropriate.

Sixth Circuit Court of Appeals

CONSTRUCTIVE POSSESSION

U.S. v. Holycross, 333 Fed.Appx. 81 (6th Cir. 2009)

FACTS: On August 3, 2005, a Columbus, Ohio, officer spotted Holycross driving fast and recklessly. He almost sideswiped an unmarked police car, which then requested a marked car to stop Holycross. When the officers in the marked car first spotted Holycross, they saw him "make a quick motion toward the floor behind the passenger seat." He leaned toward the passenger side again before the officers got him stopped. When they learned Holycross did not have a valid OL, he was arrested. During an inventory search, the officers found a handgun under the passenger seat.

Holycross was a felon, so he was indicted, and eventually convicted, for possession of the gun. He then appealed.

ISSUE: Is a decision on constructive possession a case by case process?

HOLDING: Yes

DISCUSSION: Holycross argued that there was insufficient evidence to prove he was in possession of the gun. The Court agreed that "although a defendant's proximity to a weapon does not by itself prove possession, proximity combined with 'other incriminating evidence' - including an attempt to conceal the weapon or forensic evidence - may support a finding of possession."[90] The facts, as presented to the Court, clearly indicated that the officers reasonably believed he was aware of the gun, and that was confirmed by the presence of Holycross's DNA on the weapon.

Holycross's conviction was affirmed.

ARREST - WARRANTS - PROTECTIVE SWEEP

U.S. v. Archibald, 589 F.3d 289 (6th Cir. 2009)

FACTS: Archibald was on probation on April 29, 2006, when Metro Nashville police arrived at his residence to arrest him for violations. Sgt. Fidler had also checked his background and learned that Archibald was a higher risk because of his violent background. They tried knocking with no response, but the officer at the front door indicated that he could hear someone moving around inside and eventually heard a male voice. After some ten minutes, the door was opened and Archibald was pulled out by the officer at the door. Officer Nielson, at the door, was inside the house momentarily and could see some walls and obstructions behind which someone could hide. Sgt. Fidler and another officer entered to do a "short protective sweep."

While inside, Sgt. Fidler spotted white powder and paraphernalia. No other person was found and no further incriminating evidence spotted. They secured the premises and obtained a search warrant. A firearm was found, trigging an additional charge, since Archibald was a convicted felon.

[90] U.S. v. Arnold, 486 F.3d 177 (6th Cir. 2007); U.S. v. Bailey, 553 F.3d 940 (6th Cir. 2009).

Archibald moved for suppression, arguing that the officers had no reason to believe there was anyone else in the apartment. When that was denied, Archibald took a conditional guilty plea and appealed.

ISSUE: May officers do a protective sweep when they have no reason to believe anyone else is in the house?

HOLDING: No

DISCUSSION: The Court began by noting that "it is well-settled that arrest warrants are not search warrants."[91] The Supreme Court had "identified two types of warrantless protective sweeps of a residence that are constitutionally permissible immediately following an arrest."

> The first type allows officers to "look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched."[92] The second type of sweep goes "beyond" immediately adjoining areas but is confined to "such a protective sweep, aimed at protecting the arresting officers[.]" The first type of sweep requires no probable cause or reasonable suspicion, while the second requires "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." The Supreme Court also "emphasize[d]" that this second kind of sweep is "not a full search of the premises," but "extend[s] only to a cursory inspection of those spaces where a person may be found" and should last "no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises."

In this case, the Court noted, the government agreed that the "challenged protective sweep occurred incident to an in-house arrest and involved an area immediately adjoining the place of Archibald's arrest." However, it argued the case under the second category, "which requires 'articulable facts' supporting the presence of another person who might pose a potential danger to the arresting officers." It was the government's burden to argue the case under the proper provision. The Court however, noted that the protective sweep would have failed under that provision as well, as Archibald was taken into custody at the threshold. The officers "did not see any other individuals, weapons, or other contraband when they looked inside the doorway." Archibald was pulled outside and handcuffed. The sweep did not just encompass the adjoining room but apparently the entire house. The Court noted, "by extending the scope of the protective sweep, the officers ran the risk of exposing themselves to more danger."

The prosecution tried to argue the justification under the second Buie category with the following:

> (1) of defendant's prior arrests for violent crimes; (2) the "particular vulnerability" of the officers; (3) Archibald's delay in responding to the knocking and announcement by Nielsen; (4) "noises from inside defendant's residence"; and (5) Archibald's arrest and the protective sweep occurred simultaneously.

Taking each in turn, the Court found that Archibald's "own dangerousness is not relevant" when the officers were thinking about someone else inside the house - Archibald's prior history was irrelevant.[93] Prior cases

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[91] See Steagald v. U.S., 451 U.S. 204 (1981)
[92] Maryland v. Buie, 494 U.S. 325 (1996)
[93] See U.S. v. Colbert, 76 F.3d 773 (6th Cir. 1996).

offered in support of the government's position involved "strong circumstantial evidence that potentially dangerous criminal accomplices might be present." The officer's concern about being in the "fatal funnel" because of their inability to see beyond certain visual obstructions does not change their burden. Further, it noted if "entry in a 'fatal funnel' poses a greater risk to law enforcement, the prudent course of action would have been to back away from the door, not proceed through it." Archibald's long delay in coming to the door caused the officer at the door to testify about what he heard, but the court focused on language that suggested the officer heard only one person inside. The Court noted that "lack of knowledge as to whether others were in a home necessarily failed the Buie standard" as to do otherwise "creates an incentive for the police to stay ignorant as to whether or not anyone else is inside a home in order to conduct a protective sweep." Finally, the Court simply dismissed any justification under the fifth provision.

The Court reversed the lower court's decision and remanded the case.

SEARCH & SEIZURE - SEARCH WARRANT

U.S. v. Gunter, 551 F.3d 472 (6th Cir. 2009)

FACTS: On January 20, 2006, a federal magistrate signed a warrant to search Gunter's home, property and vehicles. As a result of the evidence found during the search, Gunter was convicted of drug trafficking and related charges. He appealed.

ISSUE: May a warrant infer, rather than prove specifically, that drug evidence will be found at a drug dealer's residence?

HOLDING: Yes

DISCUSSION: The Court reviewed the lengthy search warrant affidavit, which detailed, among other things, a "number of recorded and unrecorded conversations where the [CI] discussed the distribution of large quantities of cocaine" with other conspirators. Gunter argued that the magistrate had relied upon hearsay evidence to issue the warrant, in some cases involving a confidential informant, and upon the investigator's conclusions after the investigator listened to the recorded phone conversations. The Court found that both were insufficient to support probable cause.

The Court, however, noted that the "affidavit does support an independent determination of probable cause" because it indicates that the "informant had provided accurate and reliable information each time he was used in the past." Further, the informant "provided detailed information" which were "corroborated by independent police investigations, including surveillance of meetings and review of telephone records." The court agreed that this was "enough information to establish the informant's reliability."

The Court then looked to the "veracity, reliability and basis of knowledge for" Banks, one of the co-conspirators. The Court agreed that Banks "had nothing to gain by implicating Gunter in the context of a drug deal that was surreptitiously recorded and that implicated Banks as well." And again, an independent police investigation corroborated Banks's statements. Gunter also argued that the affidavits "fail to establish a proper nexus between his residence and the criminal activity at issue." Although the residence was only mentioned in passing, the Court agreed that the evidence indicated that "Gunter was engaged in repeated purchases of [large amounts of] cocaine." As such, "it was reasonable to infer that evidence of illegal activity would be found at Gunter's residence."[94]

[94] U.S. v. Jones, 159 F.3d 969 (6th Cir. 1998).

After resolving several other issues, the Court found that the warrant was sufficient. Gunter's conviction was affirmed.

U.S. v. Paull, 551 F.3d 516 (6th Cir. 2009)

FACTS: In 2004, Paull was developed as a suspect on charges of trafficking in child pornography. Agent Hagan (ICE) obtained a search warrant on Paull's Ohio residence. Paull was present during the execution of the search warrant and the agent explained to him that "he was not under arrest" and that they were only going to execute the warrant. She asked if he wanted to give his side of the story, but he declined. During the search, a large number of printed images of child pornography, along with computer disks, were found in a garbage can - the still images totaled over 3,700 photos. Video was also found. Agent Hagan showed Paull the evidence and stated that she no longer needed to speak with him. She then left the room. "Paull immediately requested to speak with her and she returned to the kitchen." Agent Hagan reiterated he was not under arrest, but gave him his Miranda warnings. Paull took responsibility for the items found in the garage and then provided a written confession.

Paull was indicted for possession of the child pornography and moved for suppression both on the issue of the search warrant and the confession. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: May a warrant for child pornography reference events that are remote in time to the date the warrant is requested?

HOLDING: Yes

DISCUSSION: First, Paull argued that the warrant was stale, because the affidavit "relied on events that were" at least 13 months prior. The Court agreed that as a rule, the facts supporting the warrant must occur in close time proximity to the issuance of the warrant. The Court noted that in the case of child pornography, previous courts "have reasoned that because the crime is generally carried out in the secrecy of the home and over a long period, the same time limitations that have been applied to more fleeting crimes do not control the staleness inquiry for child pornography."[95]

Further:

> The affidavit in this case alleged that Paull subscribed to child pornography websites and that he continued to do so over the course of two years. Paull argues that these allegations are too generalized and remote to provide probable cause against him at the time of the search. But he does not dispute that the affidavit alleges that he was subscribing and downloading images from multiple sites. This makes the habits of similarly situated consumers of child pornography relevant.[96] For instance, one of the websites to which Paull subscribed was described as an "onlinesharing-community" that was "created specifically for sharing child pornography collections." The affidavit's expert description of the barter economy in child pornography provides context for that subscription: Paull was likely involved in an exchange of images and he therefore is likely to have a large cache of such images in order to facilitate that

[95] U.S. v. Wagers, 452 F.3d 534 (6th Cir. 2006).

[96] See Lacy, 119 F.3d at 746 n.6 ("The affidavit in this case contained sufficient evidence that [the defendant] had downloaded computerized visual depictions of child pornography to provide a foundation for evidence regarding practices of possessors of such pornography.").

participation. Moreover, while Paull last purchased a subscription thirteen months prior to the search, the record is silent regarding how long it was for or whether it had indeed expired at the time of the search. In light of the nature of the crime, these allegations are sufficient to establish a fair probability of on-going criminal activity.

In addition, the Court noted that even if the warrant did not technically suffice, it was more than enough to meet the Leon "good faith" exception.[97] The Court also agreed that the warrant was not overbroad in that it permitted the search of the garage, as the Court noted that the law "presumes the opposite, that 'a warrant for the search of a specificed residence or premies authorizes the search of auxiliary and outbuildings within the curtilage.'"[98] The Court found the search to be proper. Paull also argued that his oral and written confessions were obtained in violation of his Miranda rights. The Court noted that the officer's version of the discussion was found more credible than Paull's, and upheld the decision of the trial court.

Paull's conviction was affirmed.

U.S. v. Higgins, 557 F.3d 381 (6th Cir. 2009)

FACTS: In 2005, a Jackson, TN officer developed information about drugs being sold in Madison County, Tennessee. Investigator Carneal (Madison County SO) prepared an affidavit, to wit:

> *Henderson Police Department (Chester County) regarding a traffic stop conducted in that jurisdiction in which Officer Phil Willis of the Henderson Police Department recovered a large amount of cocaine and cocaine base.*
> *Officer Willis stated that he stopped a suspect for driving under the influence. Officer Willis informed Sgt. Carneal that the suspect had approximately 15 grams of powder cocaine, along with 26 grams of cocaine base. (Both substances field tested positive for cocaine). The suspect also had two additional passengers in the vehicle. All three individuals were separated and interviewed separately at the Chester County Sheriff's Department. The driver of the vehicle, whose name has been disclosed to the Judge, stated he picked up the cocaine from a location in Madison County and gave an address of 1336 Campbell Street, Apartment 5, Jackson, Tennessee, as the pick up location for the narcotics. He also identified the person selling the narcotics as Oliver Higgins. This information was corroborated by both passengers of the vehicle who stated they rode with the driver to the Campbell Street location. Officers from Metro Narcotics did transport the driver of the vehicle to the Campbell Street address to confirm the exact location of the transaction. Officers with the Metro Narcotics Unit corroborated the address given by the driver of the vehicle, along with the description of a motorcycle which belonged to Oliver Higgins. Officers with Metro Narcotics did identify the motorcycle as belonging to Oliver Higgins and which was located at 1336 Campbell Street, Apartment 5, Jackson, Tennessee. The driver stated he had purchased narcotics from this location previously and had purchased the cocaine in his vehicle on September 9, 2005 from Oliver Higgins. A check of the criminal history of Oliver Higgins showed two prior felony convictions for narcotics trafficking in Hardin County, Tennessee, in 1990 and 1998.*

The judge signed the warrant and the officers found crack and powder cocaine, money, a gun, and various paraphernalia. Eventually, Higgins was charged in federal court. He requested suppression of the evidence and of statements he made. His motion was denied and he went to trial. He was convicted and appealed.

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[97] U.S. v. Leon, 468 U.S. 897 (1984).
[98] U.S. v. Watkins, 179 F.3d 489 (6th Cir. 1999)

ISSUE: Should a warrant specifically attest to an informant's reliability?

HOLDING: Yes

DISCUSSION: Higgins argued that the affidavit was deficient in several respects. First, he argued that the affidavit "did not attest to the informant's reliability." The Court agreed that:

> … the fact that the informant was known to the affiant and issuing magistrate and admitted a crime does not alone provide probable cause. In addition to providing scant information about the informant's reliability, the "corroboration" included in Carneal's affidavit does little to reinforce the informant's assertions. The affidavit states that the other passengers in the car confirmed the informant's statement, but it does not say whether they did so unprompted or if the police asked them whether the drugs had come from Higgins's apartment. The affidavit states that the police corroborated the fact that Higgins lived at the stated location, owned the motorcycle parked outside, and had a drug-related criminal history, but none of these facts supports the informant's assertion that he had purchased drugs from Higgins at this location the previous day.
>
> In addition, the affidavit does "not assert that the informant had been inside Higgins's apartment, that he had ever seen drugs or other evidence inside Higgins's apartment, or that he had seen evidence of a crime other than the one that occurred when Higgins allegedly sold him drugs." Absent that, the Court agreed, "the affidavit fails to establish the necessary 'nexus between the place to be searched and the evidence sought.'"[99]

The Court agreed the warrant did not provide sufficient probable cause. However, the Court noted, it must also look to the good faith exception, and stated that:

> United States v. Leon[100] modified the exclusionary rule so as not to bar from admission evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective. Where an officer's reliance on a warrant is objectively reasonable, the Supreme Court held, no additional deterrent effect will be achieved through the exclusion from evidence of the fruits of that search. However, the good-faith exception is inapposite in four situations: (1) where the issuing magistrate was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth; (2) where the issuing magistrate wholly abandoned his judicial role and failed to act in a neutral and detached fashion, serving merely as a rubber stamp for the police; (3) where the affidavit was nothing more than a "bare bones" affidavit that did not provide the magistrate with a substantial basis for determining the existence of probable cause, or where the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) where the officer's reliance on the warrant was not in good faith or objectively reasonable, such as where the warrant is facially deficient.

The Court agreed that "[t]here is no evidence that Carneal included false information in the affidavit; there is no evidence that the magistrate acted as a partisan rubber stamp; the affidavit is weak, but it is not bare bones, and this court's precedents are not so clear as to make it "entirely unreasonable" to find probable cause based on such an affidavit; and there has been no showing that the warrant was so obviously deficient that official

[99] U.S. v. Van Shutters, 163 F.3d 331 (6th Cir. 1998).
[100] Supra.

reliance on it was objectively unreasonable." The Court agreed that the warrant was no so deficient that it failed to satisfy the good faith exception and that it was appropriate for the warrant to be admitted.

Higgins's conviction was affirmed.

U.S. v. McNally, 327 Fed.Appx. 554 (6th Cir. 2009)

FACTS: On March 29, 2004, Wood went to the FBI to report that she thought her former live-in boyfriend, McNally, was involved with child pornography. They had ended their relationship the month before and had protection orders against each other. McNally's worked for a photo studio and took photos of young children. She reported that she had found a computer directory entitled "child kiddie" but was unable to access it "because it was electronically locked." She said he spent a great deal of money on pornography and she had seen a number of photos of underage girls posing in sexual situations. She also reported he owned "voyeur videos and Japanese animated pornographic videos" and that he wanted her to wear school-age outfits. Agent Coburn sought search warrants for McNally's studio and home. They found child pornography at his home, but not the studio. They specifically did not find a computer file named "child kiddie."

McNally requested suppression and a Franks hearing, alleging that the agent included false information in the affidavit. Specifically, Coburn had included language that the "strangled and struck" Wood. The Court ruled that there was no evidence that was the case, and that it was a false statement. However, the Court ruled that even excluding that information, there was still sufficient probable cause to justify the search.

Wood took a conditional guilty plea, and appealed.

ISSUE: Must an informant in a search warrant be identified to the magistrate?

HOLDING: No

DISCUSSION: McNally contended that the "affidavit failed to establish probable cause to search his residence because the complainant is never identified or disclosed to the magistrate, and there [was] no independent corroboration." The Court, however, ruled that the informant had a relationship with McNally and "provided substantial and credible detail." Further, Coburn verified a great deal of the information provided.[101] The Court found that Coburn's reliance on Wood was not inappropriate.

McNally's plea was upheld.

U.S. v. Berry, 565 F.3d 332 (6th Cir. 2009)

FACTS: In 2005 the Bay Area Narcotics Enforcement Team (BAYANET), a Michigan task force, was investigating drug dealing involving Hoskins. They discovered that another known dealer, Berry, was living in the same duplex as Hoskins - which was significant because the terms of his parole required him to notify his probation officer of a change of address and Berry had not done so. Upon investigation, officers observed Berry at that address and also learned that he listed that address on his OL and other official records. His landlord knew him by another name, but identified his photo and said he'd lived there for three years. Officers decided to arrest Berry. On April 29, 2005, at about 10 p.m., they spotted him drive in. They arrested him as he got out and searched the car. They found a number of rocks of crack cocaine on the floorboard in front of the driver's seat. They sought a search warrant for his side of the duplex.

[101] See U.S. v. Tuttle, 200 F.3d 892 (6th Cir. 2000).

Part of the affidavit read as follows:

> *It has been my personal experience and I have been so informed by many other Police Officers whom I know to be truthful . . . that persons present in the residence or on the property (or entering or leaving the residence or property) where a search warrant for controlled substances is being executed oftentimes conceal controlled substances on their persons (this can be because they are selling or buying the substances or in an attempt to conceal the substances from the Police search); that vehicle's [sic] parked on the premise of places where controlled substances are found or sold oftentimes contain controlled substances . . . . It has further been my experience that people dealing and using controlled substances will oftentimes use the motor vehicles to store and transport controlled substances . . . . Furthermore, I know from my training and experience that people who sell drugs often possess firearms for the purpose of protecting themselves and the drugs from thefts or searches.*
>
> *I have previously been told by a confidential informant (CI) that Lee Henry Berry was living at the residence described in paragraph 3 above. Additionally, the CI pointed the residence out to me. I have also checked the Secretary of State computer via the LEIN system and found that Lee Henry Berry's operator's license address is listed as 1228 Asbury Ct, Saginaw, Michigan, which is also the address listed for various vehicle [sic] which he is listed as owning. Furthermore, Officer Wayne Stockmeyer of the Bay City Police department contacted Sugi Ponnampalam, the owner of the premises described in paragraph 3 above. She stated that she is the owner of 1228 Asbury Ct, and that she is currently renting the residence to an individual she knows as Alvin King, an older black male, and he pays $675 per month cash for renting the unit. Officer Stockmeyer showed Sugi Ponnampalam a photograph of Lee Henry Berry, and she identified the photograph as being the person she knows as Alvin King, the renter of the duplex. She said that she has owned the dwelling for about 3 years and that the person she knows as Alvin King has lived there the entire time.*
>
> *I know that Lee Henry Berry was convicted of delivery or attempted possession with intent to deliver less than 50 grams of a mixture containing cocaine approximately 2/23/2000, before Honorable William J. Caprathe, Bay County Circuit Judge, and that he was sentence[d] to lifetime probation. I have talked with his probation office[r], Steve Marshall, who informed me that according to the Probation Department's records, Lee Henry Berry lists his residence as being in the City of Bay City. I also know by having seen a listing of the "special conditions" of Lee Berry's probation that he is required to "Notify the probation officer immediately of any change of address or employment status." Steve Marshall told me that Lee Berry has never reported that he lives in Saginaw Township.During the evening hours of April 29, 2005, Lee Henry Berry was arrested by Officer Stockmeyer and officers from the Bay Area Narcotics Enforcement Team (BAYANET) for violating probation. The arrest took place outside of the residence described in paragraph 3 above after he was seen arriving in a car. Officer Stockmeyer told me that Lee Berry was the driver and only occupant of the car. Officer Stockmeyer also told me that as part of the search incident to arrest he found a number of rocks of what appeared to be crack cocaine on the floor of the car under where Lee Berry was sitting. Stockmeyer told me that he field tested the crack cocaine and it tested positive for the presence of cocaine.*

The warrant was signed, authorizing the officers to search for (1) cocaine and other controlled substances; (2) residency documents and similar items showing the identity of the persons residing there; and (3) a long list of

standard drug-search items, including scales, packaging materials, sales ledgers, currency, and firearms. They found a number of items, and Berry was indicted on drug and firearms charges.

Berry moved for suppression, claiming the "warrant was invalid on its face," because it failed to "establish the requisite nexus between" the duplex and drug activity. Berry was subsequently convicted of most of the charges. He then appealed.

ISSUE: Does drug activity near a suspected drug dealer's home provide probable cause that drugs will be found at the home?

HOLDING: Yes

DISCUSSION: Berry argued that the warrant lacked probable cause because officers had no information that there were any drugs in the house and because he had no access to the house following his arrest. The Court noted that to "meet the nexus requirement of probable cause, 'the circumstances must indicate why evidence of illegal activity will be found in a particular place.'"[102] The Court noted "a defendant's status as a drug dealer, standing alone, does not give rise to a fair probability that drugs will be found in defendant's home."[103] However, "there is support for the proposition that status as a drug dealer plus observation of drug activity near defendant's home is sufficient to establish probable cause to search the home."[104] The Court agreed that the warrant in this case established probable cause as it made numerous mentions of Berry's connection to drug dealing at or near his home.

Berry's conviction was affirmed.

U.S. v. Clements, 2009 WL 1789573 (6th Cir. 2009)

FACTS: In his affidavit, Det. Cudo stated that "within the past 72 hours, he had met a confidential reliable informant ('CRI')," whom Affiant Cudo considered reliable based upon his participation in several prior controlled purchases of narcotics, which led to the issuance of search warrants and drug-related arrests. The CRI informed Affiant Cudo that he had gone with an "identified black male" to the Cleveland home. The black male went inside the home to purchase a multi-ounce quantity of cocaine and allegedly made the purchase. In addition, he "stated that the CRI informed him that they could arrange for a controlled purchase using the black male as 'middleman.'" They arranged for a controlled purchase, which led them to the house in question, where he observed the black male enter and leave the home in question, and sell the drugs to the CRI. The continued to observe the property and saw "a moderate amount of vehicle traffic."

Clements moved for suppression, and was denied. He then appealed.

ISSUE: Does a warrant based upon the purchase of drugs by a subject in a home provide probable cause to search the home?

HOLDING: Yes

DISCUSSION: Clements argued that the affidavit may have provided probable cause to search the black

[102] U.S. v. Carpenter, 360 F.3d 591 (6th Cir. 2004).
[103] Frazier
[104] U.S. v. Miggins, 302 F.3d 384 (6th Cir. 2002); U.S. v. Blair, 214 F.3d 690 (6th Cir. 2000); U.S. v. Jones, 159 F.3d 969 (6th Cir. 1998); U.S. v. Caicedo, 85 F.3d 1184 (6th Cir. 1996).

male subject, but not to search the home. The Court, however, quickly concluded that the affidavit provided sufficient probable cause to search the home. Clements also argued that his right to silence had been violated at trial. Specifically, he claimed that Officer Baeppler (who booked Clements into jail) improperly testified that Clements became belligerent and refused to answer his questions during booking. The Court ruled that "refusing to answer routine biographical questions do not create or imply guilt." Such questioning is not considered interrogation, and refusal to answer such questions do not incriminate the individual for the crimes charged.

The Court agreed that a mistrial was not warranted.

U.S. v. Lewis, 327 Fed.Appx. 562 (6th Cir. 2009)

FACTS: Lewis was arrested following a traffic stop by Sgt. McCaw (Wyoming, Michigan, PD) on February 17, 2005. Sgt. McCaw pulled over Lewis's vehicle for a traffic violation. Lewis was further detained by the officer because he developed suspicion that the occupant was involved in drug trafficking, since he had left a known drug house in the early morning hours, was visiting a known drug dealer, and Lewis gave short answers and avoided eye contact. In a separate contact, Lewis's apartment was searched pursuant to a warrant and a handgun was found. He admitted he was involved in drugs and that he possessed the gun, but later argued that there was no evidence that he "possessed the gun in furtherance of drug trafficking."

Lewis was indicted, convicted, and appealed.

ISSUE: Is a gun found in close proximity to drugs and cash presumed to be seizable under a warrant?

HOLDING: Yes

DISCUSSION: Lewis argued that all of McCaw's information could also have an innocent explanation. The Court, however, noted that "circumstances comprising a particularized and objective basis for reasonable suspicion need not be uncommon or especially unique."[105]

With respect to the gun, the Court agreed with the trial court that although the gun was unloaded, it was found in close proximity to cash and drugs and to ammunition. Such proximity permitted a jury to infer that the gun was intended for that purpose.

The Court upheld the denial of the motion to suppress and upheld the introduction of the weapon.

U.S. v. Roberson, 2009 WL 1649194 (6th Cir. 2009)

FACTS: In a warrant to search Roberson's girlfriend's home, Officer Fangman (Hamilton County Regional Enforcement Narcotics Unit - RENU) set out the following:

> *On February 20, 2007, law enforcement authorities received information from a "confidential" [sic]1 source alleging that Roberson was manufacturing and trafficking in large amounts of crack cocaine from a specific address, 3665 Hillside Avenue, in Cincinnati, Ohio. The tipster gave a physical description of Roberson, stated that Roberson used a blue Cadillac to facilitate his drug trafficking operation, and indicated that Roberson lived at the single-family residence with Shaunte Martin. The source further stated that Roberson had, in the past,*

[105] U.S. v. McCauley, 548 F.3d 440 (6th Cir. 2008)

transported large amounts of cocaine to this address, where he allegedly manufactured cocaine and crack cocaine and prepared it for further distribution. The tipster claimed that he/she had been in the residence within the past 72 hours and observed Roberson in possession of a quantity of crack cocaine and with several dogs and guns inside the residence to provide protection for his drug trafficking operation. The tipster stated that he/she was familiar with the appearance of crack cocaine due to past contacts with crack cocaine drug abusers and traffickers.

Officer Fangman, with over nineteen years of law enforcement experience, nine of which were spent as a narcotics investigator, was assigned to investigate the tip and, if warranted, to prepare an application for a search warrant of 3665 Hillside Avenue.

On the same day that the tip was received, Officer Fangman began an investigation to verify the information. A check of public records revealed that ownership of the residence, as well as utility service, was in the name of Shaunte Martin. The check also showed a prior utilities account in the name of Shaunte Martin at 5457 Hillside Avenue, identified as the prior address of Roberson. Officer Fangman's review of criminal records indicated that Roberson had a 1995 felony drug trafficking conviction, a 1995 resisting arrest conviction, and a 1998 corrupting a minor with drugs conviction.

Officers began surveillance, and noted a great deal of heavy traffic at the home. They did a trash pull and discovered incriminating information related to drugs. The affidavit information, however, "contained two inaccuracies" - the CI was actually an anonymous source and he misstated the color of the suspect Cadillac. The search warrant was signed and executed and the information found led to Roberson's arrest.

Roberson moved for suppression on the basis of the false statements and was denied. He offered evidence that the alleged tipster had not been in the home within the previous 72 hours. The Court held a hearing at which the witness concerning the tipster testified that she believed she knew the identity of the tipster, but admitted that she did work during the day and had no knowledge of who might have been in the house while she was away. Officer Fangman acknowledged his error. The Court, however, found that even redacting the questioned material, that there remained sufficient credible information to support the warrant.

Roberson took a conditional guilty plea, and appealed.

ISSUE: May information be redacted from a warrant and the warrant remain valid?

HOLDING: Yes

DISCUSSION: Roberson argued that the "redacted affidavit" did not establish probable cause to search the home. The Court agreed with the reasoning of the trial court and ruled that even removing the information did not render the warrant invalid. Specifically, the Court found that the officers corroborated the information provided by the tipster and established a nexus between the place to be searched and the evidence sought.

Roberson's plea was upheld.

U.S. v. Quinney, 583 F.3d 891 (6th Cir. 2009)

FACTS: Quinney was under investigation for creating and passing counterfeit currency. Two Secret Service agents visited his home and received consent to look in his bedroom. They saw a printer. Quinney admitted that "he had passed bogus bills, but denied printing them." After further questioning of two witnesses, who claimed he had printed the bills, the agents returned. "During the second visit, the agents seized the

printer without obtaining either consent or a search warrant." Quinney's stepfather later "testified that the agents simply announced that they were seizing the printer without seeking even the stepfather's permission." They found Quinney and interviewed him, in their car. He was not arrested or given Miranda warnings. They told him that they had the printer and it was being examined, and also that witnesses had stated he created the bills. At some point, he confessed, in writing, and that was followed up by a supplemental confession the next week. (There was some question as to whether he received Miranda at that time.)

Quinney was charged with counterfeiting. He requested suppression of the evidence and the statements, but was denied. He then appealed. The case was reviewed and sent back to the trial court, because the trial court has "applied an incorrect standard of review in analyzing the motion to suppress." The trial court again upheld the suppression and Quinney again appealed.

ISSUE: Should a search warrant be obtained prior to items being taken from a house, when there is no exigency?

HOLDING: Yes

DISCUSSION: Quinney challenged the seizure and the admissibility of the statements, "alleging that the district court misapplied the inevitable-discovery doctrine."[106] The government argued that "the agents had probable cause to obtain a search warrant at the time the printer was seized." The Court distinguished the case the government presented in support of that argument, U.S. v. Kennedy[107], from U.S. v. Haddix.[108] The Court agreed with Quinney that the agents should have gotten a search warrant and that the motion to suppress that item should have been granted. Because the admission of the statements depended upon the validity of the printer being admissible, the Court remanded the case to "reevaluate whether these post-seizure statements should also be suppressed as 'fruit of the poisonous tree.'"

Quinney's plea was vacated and the case remanded.

U.S. v. Smith, 2009 WL 2031866 (6th Cir. 2009)

FACTS: Officer Uselton, a Special Agent with the West Tennessee Violent Crime and Drug Task Force and a member of the Crockett County Sheriff's Dept., obtained search warrants for two locations, a residence and a business, based upon the same search warrant affidavit. Drugs and handguns were seized from the residence, and Smith was indicted.

Smith moved for suppression. At the hearing, Officer Uselton stated that "he had received information from a confidential informant that drug sales were occurring at 34 Williams Circle and 544 West Church Street in Alamo, Tennessee." Controlled buys were made at both locations, two buys at the business, (one within 5 days, one within 72 hours of the search, but the latter wasn't mentioned in the affidavit) and one at the residence was made within 72 hours and referenced in the affidavit.

The trial court denied the motion, and Smith took a conditional guilty plea. He then appealed.

ISSUE: May controlled buys be used to corroborate an unproven informant?

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[106] U.S. v. Alexander, 540 F.3d 494 (6th Cir. 2008); Nix v. Williams, 467 U.S. 431 (1984).
[107] 61 F.3d 494 (6th Cir. 1995)
[108] 239 F.3d 766 (6th Cir. 2001)

HOLDING: Yes

DISCUSSION: Smith argued "that the affidavit failed to indicate any reason why the officers considered the confidential informant to be reliable and that the officers did not observe any drug transactions taking place inside of 544 West Church Street." However, the Court agreed that the corroboration required for an informant not specifically shown to be reliable may be "established by a police-monitored controlled purchase."[109] The Court agreed that looking at the four corners of the affidavit, it was clear that "proper measures were taken in this case to ensure the reliability of the controlled purchases, including thoroughly searching the informant and the vehicle used before the purchase and maintaining a visual on the confidential informant going to and coming from the residence."

The Court found probable cause to issue the search warrants, and affirmed Smith's plea.

U.S. v. Dyer, 570 F.3d 758 (6th Cir. 2009)

FACTS: Glance was renting a cabin at Pigeon Forge, TN, in December, 2006. State officers received a tip that Dyer and Glance were selling drugs from the cabin, so they initiated surveillance. On Dec. 7, Officer Seals did a search warrant affidavit.

The warrant read:

> *On December 4, 2006, I was contacted by Jackson County, NC, Sheriff's Department Lieutenant Kim Hooper regarding information he had received from a confidential source, hereinafter referred to as CS1. The Jackson County Sheriff's Department has charged CS1 with various felony drug charges and the disposition of those charges are [sic] pending. On December 1, 2006, CS1 voluntarily gave a statement against his penal interest to Jackson County Sheriff's Department Detective Rick Buchanan. CS1 stated that CS1 and another individual, within the past seven days, went to meet with Kenny Dyer at a rental cabin in Pigeon Forge, TN. CS1 [s]tated that while they were at the rental cabin, the individual CS1 was with purchased one ounce of methamphetamine from Kenneth James Dyer II for $1,400.00. During the transaction, CS1 observed a large quantity of Methamphetamine remaining in the possession of Kenny Dyer. CS1 stated that the transaction, which took place in CS1's presence, transpired in the basement of the rental cabin where a pool table is located. CS1 stated that Stacie Lee Glance was also present at the rental cabin during the transaction. CS1 further stated that a blue Dodge Neon and a gray Ford Ranger with North Carolina registration were parked outside the cabin at the time.*
>
> *On December 6, 2006, I met with Lieutenant Hooper, Detective Buchanan, and CS1 in Pigeon Forge, TN. CS1 took us to a 316 Silver Stone Way and showed us where the drug transaction had taken place. A blue Dodge Neon bearing NC registration . . . and a gray Ford Ranger bearing NC registration . . . were parked in front of the cabin.*
>
> *On December 6, 2006, I conducted surveillance at 316 Silver Stone Way. I observed Kenneth James Dyer II, and a white female, fitting the description of Stacie Lee Glance, exit the rental cabin and leave in a blue Dodge Neon. I was able to identify Kenneth James Dyer II from a photograph provided to me by Lieutenant Hooper.*

[109] U.S. v. Coffee, 434 F.3d 887 (6th Cir. 2006)

> *On December 6, 2006, I received information from Lieutenant Hooper that Kenneth James Dyer II and Stacie Lee Glance are both wanted in North Carolina. Lieutenant Hooper faxed me copies of warrants from Swain County, NC, and Buncombe County, NC. Dyer is wanted in Swain County for felony possession of schedule II controlled substance, felony violation of probation, and misdemeanor violation of probation. He is wanted in Buncombe County for feloniously possessing, manufacturing, and transporting methamphetamine in excess of 200 grams but less than 400 grams.*

The search warrant was signed. When they arrived to execute the warrant, Dyer and Glance were leaving. Dyer, driving, rammed his vehicle into one of the police cars and fled the scene. The officer pursued in the remaining car but lost the pair. During the search, the officers found almost $5,000 in cash, 51 grams of methamphetamine and assorted paraphernalia. Glance returned later the same day but was unable to get into the cabin, as the rental company had changed the door code. When she called the rental company to get in, the rental company called the police. Glance was arrested at the cabin and Dyer was also later apprehended in another state.

Dyer was charged, requested suppression, and was denied. He took a conditional guilty plea and appealed.

ISSUE: Does an officer's corroboration offset a lack of knowledge about an informant?

HOLDING: Yes

DISCUSSION: The trial court had ruled that Dyer had a privacy interest, even though he wasn't listed on the rental agreement, because he was Glance's overnight guest. However, the Court noted that even though both had privacy interests, that a valid search warrant overrules that interest. The Court agreed that a judge might rely on hearsay, but "when the majority of the information in the affidavit comes from confidential sources, as it does in this case, courts 'must consider the veracity, reliability, and the basis of knowledge for that information as part of the totality of circumstances.'"[110] Dyer corrected noted that the affidavit at hand lacked "any information about the confidential informant's previous tips, the length or nature of the relationship between the informant and Seals, and any indication that the magistrate judge learned of the informant's identity." However this warrant does aver that the CI did witness a drug deal at the premises. The Court noted that U.S. v. Higgins, "reaffirmed the importance of the 'necessary nexus between the place to be searched and the evidence sought,' finding no probable cause based, in part, on the absence of facts indicating that "the informant had been inside [the place to be searched] or that the informant had seen drugs or other evidence in or around [the defendant's] apartment."[111] In addition, the officers knew the identity of the informant, although it was not disclosed in the affidavit. Even though the affidavit lacked sufficient corroborating detail, the Court found that unnecessary in this case. The officers did perform some independent corroboration, doing surveillance and background checks on Glance and Dyer.

The Court upheld the denial of the motion to suppress.

U.S. v. Robinson, 2009 WL 3735868 (6th Cir. 2009)

FACTS: Following three uncontrolled drug buys, observed by undercover officers, Sevierville (TN) police sought a warrant for the address. Robinson was present at the time and charged as a result of the

[110] U.S. v. Helton, 314 F.3d 812 (6th Cir. 2003), see also Frazier and Illinois v. Gates, 462 U.S. 213 (1983).
[111] 557 F.3d 381 (6th Cir. 2009).

items found there. He moved for suppression, asserting that the warrant included false statements and omitted material facts. The warrant, in its entirety, read:

> *1. I am a Special Agent with the State of Tennessee Fourth judicial district Drug and Violent Crime Task Force. I have been employed by the Pigeon Forge Police Department for approximately 6 years, the past 2.5 years of which I have been assigned to the Drug Task Force . . . . During the past 11 years as an officer and Drug Task Force Agent I have been involved with or participated in approximately 300 narcotic investigations. I have worked in an undercover capacity to purchase narcotics and gain intelligence. I have executed search warrants, conducted surveillance of drug transactions, seized evidence, arrested suspects, interviewed suspects and conferred with Local, State, and Federal Prosecutors and other Law Enforcement Officials in my community regarding narcotic investigations, and as a result, gained considerable experience.*
> *2. On October 27, 2004, while in an undercover capacity, I purchased cocaine from an individual. During that undercover drug transaction after the individual was given money by me, Drug Task Force Agents followed the person to 1828 Norlil road Sevierville, Tennessee. The individual then brought back what was believed to be Cocaine from the residence.*
> *3. On November 04, 2004 while in an undercover capacity, I purchased cocaine from the same individual. During that undercover drug transaction after the target was given money by me, Drug Task Force Agents followed the person to 1828 Norlil road Sevierville, Tennessee. The individual then brought back what was believed to be Cocaine from the residence.*
> *4. On November 05, 2004 a third undercover drug transaction was conducted from the same individual. The individual was followed to 1828 Norlil Road Sevierville, Tennessee. The individual then brought back what was believed to be cocaine from the residence.*
> *5. The white powder substance in the above three occasions field tested positive for cocaine.*
> *6. Based on above intelligence, surveillance, experience and training, Affiant David L. Joyner believes that illegal narcotics and drug proceeds are in the residence of 1828 Norlil road Sevierville, Tennessee. The residence to be searched has a physical address of: 1828 Norlil Road Sevierville, Tennessee.*
> *7. I request to search the above mentioned residence, including outbuildings and vehicles for: narcotics, packaging materials used to package and preserve narcotics, weighing devices . . . and other documentation which reflect narcotic sales, weapons, which are used as protection devices in the illegal drug trade, illegal drug proceeds and surveillance equipment. All of these items constitute contraband; property used, or intended to be used in commission of a drug offense in violation of the laws of the State of Tennessee.*[112]

The trial judge denied the suppression. Robinson was convicted, and appealed.

ISSUE: Will the omission of facts from a search warrant affidavit always invalidate the warrant?

HOLDING: No (but see discussion)

DISCUSSION: The Court noted that although officers testified during the hearing, they failed to include in the affidavit that a CI had arranged for and participated in the buys, and that the CI, rather than an officer, "handed the buy money to Thomas." Robinson argued that "several crucial facts' were excluded - "1) there was no mention of the participation of the female confidential informant (CI) who actually conducted the buys; 2) there was no mention that the "individual" dealing with the female CI, the seller, was not searched to make sure that

[112] Errors in original.

he did not already have drugs on him; and 3) there was no reference to the fact that the "individual" was not searched to make sure he did not possess any significant amount of money." He further argued that the omissions misled the judge, but the Court disagreed. The Court quoted from the magistrate judge's report and recommendation at length, which included information both from the affidavit and the suppression hearing, and agreed that while certain of the information was lacking, it was still sufficient for the judge to find a substantial basis for concluding that criminal evidence would be found. The Court found that its "conclusion does not change when the involvement of the CI is added to the equation; nor is it undermined by the fact that the buys were not 'controlled.'"

The Court affirmed the denial of the motion to suppress.

SEARCH & SEIZURE - REASONABLE EXPECTATION OF PRIVACY

U.S. v. Adams, 583 F.3d 451 (6th Cir. 2009)

FACTS: At about 1:30 a.m., on May 15, 2006, Adams and others were gathered in a motel room in Nashville, TN. The room was registered to Bond, who had rented it on a weekly basis between March 3 and June 2. The gathering drew the attention of Sgt. Eby, on patrol, as he saw a lot of foot traffic around the room. He asked for backup to do a knock and talk. About the time backup arrived, one of the visitors noticed the police cars gathering and alerted the others in the room. A few minutes later, Sgt. Eby and Officer Valiquette knocked and someone opened the door. Bond, who was in the room, identified himself as the registered guest and stepped outside to talk to the officers. When the door was initially opened, the officers noticed signs of drug activity. Bond agreed to a search. Sgt. Eby searched while the officer watched the guests. Sgt. Eby spotted a jacket lying on the floor in the gap between the bed and the wall and asked who it belonged to - no one claimed it. He looked in the pockets and found a gun, along with a crack pipe and crack cocaine. After further questioning, the ownership of the jacket was narrowed to two men, Adams and Lymon. Once he was given Miranda rights, Adams denied possession of the jacket or the gun.

Adams was taken to a patrol car, where the interrogation continued. Finally, at about 4:15, after the officer told him security video showed him wearing the jacket, Adams confessed to possessing the gun. The officer completed a "gun questionnaire form" that Adams signed, but certain boxes indicating that Miranda rights had been given and/or waived were not checked.

Adams, a felon, was indicted for possession of the gun and moved for suppression. When that was denied, he was convicted and appealed.

ISSUE: If a person doesn't acknowledge ownership of an item, when asked, do they retain an expectation of privacy in it?

HOLDING: No

DISCUSSION: The Court started its analysis with the search of the jacket. It noted that Bond, the renter, had a "legitimate privacy interest in the room and thus, the authority to give consent to the officers to search the room for contraband." As such, the question was whether Adams "retained a sufficient expectation of privacy in the jacket." The Court noted that when no one claimed the jacket, "any privacy interest was effectively abandoned…." The jacket was not in Adams' possession and the officer had already gone through other clothes scattered on the floor. The Court distinguished the jacket from the footlocker in U.S. v. Chadwick, and also noted that the "law regarding search and seizure of closed containers has evolved since Chadwick was

decided."[113] Once the officer picked up the abandoned jacket, he was justified, under officer safety, to search further, when he noted its unusual weight. The Court upheld the search.

With respect to Adams' confession, the Court agreed that even though no written waiver was executed, that "Adams knowingly and voluntarily waived his Miranda rights." There was no indication he did not understand the rights and he continued to talk and "subsequently made incriminating statements." The Court agreed that despite the confusion over the form, the evidence indicated Adams waived his Miranda rights implicitly by continuing to talk to the officer.

The Court upheld the denial of the motion to suppression.

U.S. v. Gregory, 311 Fed.Appx. 848 (6th Cir. 2009)

FACTS: Gregory argued that the search warrant obtained against him by BATF officers included errors that invalidated it. The first search warrant affidavit included a statement that:

> Special Agent Moore stated that numerous named law enforcement officers conveyed to him that Gregory had a long criminal history, including convictions for drug trafficking, possession of prohibited firearms, and aggravated burglary, and was once involved in a "shootout" with a police officer who was investigating him. Gregory was reputed to be a "a major drug dealer" who "always keeps a large supply of guns." His neighbors, including a police officer who lived across the street and another officer who resided in the same neighborhood, consistently observed "suspicious activity" at his home. The officers witnessed: people pulling up to the residence, which has a high privacy fence, and throwing a plastic bag over the fence. A short time later, another plastic bag will come back over the fence from Gregory's residence. The car will then leave and the officers have observed on several occasions, Gregory come out from the house as the car starts to drive away and look around the area. Many of the individuals engaging in this activity were "known by law enforcement officials to be users of illegal drugs."

The second warrant was not at issue.

In the third affidavit, for a storage unit Gregory leased, the information from the first affidavit was restated, along with the results of that search warrant. (Officers seized fifteen guns, most loaded, and including a fully loaded machine gun and a large amount of ammunition. One of the guns was apparently stolen. In addition, they found a large amount of Oxycontin and marijuana, and bomb making literature.) In addition, the affidavit indicated that the media attention from the first warrant had brought forth a number of witnesses that indicated that more guns might be stored elsewhere. The department located the leased unit, and the owner of the storage unit location stated that the lease agreement allowed him to enter if there was any information that indicated the contents might be harmful. He cut off the lock and found guns and bomb-making materials. Law enforcement officers "secured but made no entry into the unit" at that time. A drug dog alerted on the exterior of the unit. "Witnesses consistently confirmed that they saw firearms and illegal drugs in Gregory's house and that he carried a gun with him all the time." He "bragged that he had enough firearms 'to start an army.'" At that time, they obtained the warrant. A search of the unit revealed an "impressive" collection of guns - approximately 190, along with a vast amount of ammunition and other "unconventional warfare devices."

[113] 433 U.S. 1 (1977); California v. Acedvedo, 500 U.S. 565 (1991).

Gregory moved for suppression of the evidence located as a result of the first and third warrants, claiming the investigator "secured the search warrants through deception and unreliable information." The Court denied the motion, and further denied a Franks hearing. Gregory was convicted and appealed.

ISSUE: May old information be included in an affidavit to provide context?

HOLDING: Yes

DISCUSSION: With respect to the first warrant, Gregory argued that his "alleged prior criminal history" should not have been considered, and that the information in the affidavit was stale and unreliable. The Court found that Gregory's argument "erroneously conflate[s] the sufficiency of the evidence" to a higher standard than is actually required. The old information in the affidavit was provided simply to supply "context to the more current information." The Court found the affidavit to be "truthful and thorough."

With respect to the third affidavit, the Court disagreed that it was "based on a prior illegal warrantless search of that unit." Gregory argued that the officers manipulated the owner and manager "to perform an act that law enforcement could not," and thus "illegally circumvented the warrant requirement." The Court found that the information known to the officers was enough to almost require that the unit be examined and secured.

The Court upheld the admission of the results of the warrants. Gregory's conviction was affirmed.

SEARCH & SEIZURE - CONSENT

U.S. v. Mitchell, 2009 WL 87474 (6th Cir. 2009)

FACTS: On Dec. 2, 2002, Lt. Clark and Officers Dickerson and Nelson (Memphis, Tenn. PD) traveled to an address to execute a federal arrest warrant. Lt. Clark, at the back of the address, observed a vehicle pull in, and he hid to "be able to see if the subject of the arrest warrant was in the car." He saw Mitchell "push something towards the console." He ordered Mitchell out of the car and saw that the object Mitchell had tried to hide was a bag of cocaine.

"Mitchell denied living at the apartment, but his keys matched the lock on the door." Lt. Clark was called away, so Deputy Sheriffs Ballard and Trammell came to assist. Two women arrived, and Rush, one of the women, identified herself as the resident of the apartment and "stated the Mitchell was her boyfriend." Ballard told her about the drugs, and she agreed, both verbally and by written consent, to allow the deputies to search the apartment. They found two loaded handguns and a substantial amount of crack and powder cocaine. Immediately next to where the cocaine was found, they also found a digital scale, ammunition and Mitchell's Social Security card. Mitchell was given Miranda warnings and waived. He admitted owning one of the guns (and having borrowed the other from a relative) and to owning the drugs.

At the subsequent suppression hearing, Powell, a public defender's investigator, testified that he interviewed Rush and that she claimed that she only consented to the search because the officers "threatened to get a search warrant and take her children from her."

Mitchell was indicted and convicted. He appealed.

ISSUE: Is a consent invalid because it was made after a "threat" to get a search warrant?

HOLDING: No

DISCUSSION: Mitchell argued that Rush's "consent was not voluntary because it was allegedly made under duress." The trial court, however, found that the District Court had sufficiently reviewed the matter and made a valid finding that the consent was voluntary.

Mitchell also argued that it was improper to admit testimony regarding an incident that occurred 14 months after the case at bar. The trial court had permitted the "evidence of the subsequent incident for the limited purpose of establishing Mitchell's specific intent to distribute the drugs in the instant case," and issued limiting instructions to that effect. The Court agreed that "[b]ecause specific intent was an element of the charged offenses, and because the district court properly limited the scope of the evidence to this element, the district court did not abuse its discretion in ruling that the evidence was relevant and admissible for this limited purpose."

Mitchell's conviction was affirmed.

U.S. v. Young, 2009 WL 822634 (6th Cir. 2009)

FACTS: On March 8, 2006, Young was summoned to the Carroll County (TN) Sheriff's Department "by ATF agents as a ruse to allow agents to execute an arrest warrant in a controlled environment." He arrived with his wife and small child, and he was separated from them. He was told by ATF agents that he was under arrest pursuant to a warrant. He was given Miranda and told he was being arrested for being a felon in possession of a firearm. He immediately "asserted that he was not a drug dealer and repeated this statement throughout the questioning with the agents." He was asked for consent and allegedly gave verbal consent. He agreed there was a firearm in a truck on his property and agreed that the agents could retrieve it. He was also told that he would be taken to the house to get the gun and his medication, and that he would be taken before the magistrate judge. At some point, he signed a consent. They retrieved the gun and searched the house. No drugs were found, but they did find ammunition.

Young requested suppression and was denied. He then took a conditional guilty plea and appealed.

ISSUE: May a person in custody give consent?

HOLDING: Yes

DISCUSSION: Young argued that his consent was invalid as it was not voluntary. The Court found that the events were "nonconfrontational, [Young] was treated fairly, and the discussion was brief." Even though Young "might have been scared and upset, the facts do not suggest the experience rose to the level of duress." The Court agree that Young had "limited education, he had previous engagements with law enforcement, … and thus he was not unfamiliar with his Constitutional rights." Further, the "record does not suggest [Young] felt powerless to prohibit the search."

The Court agreed that Young "voluntarily consented to the search of his property." Young's conditional plea was affirmed.

U.S. v. Canipe, 569 F.3d 597 (6th Cir. 2009)

FACTS: On June 25, 2007, Deputy Hagie (Washington Co., TN, SD) was told by a supervisor that Canipe, a convicted felon, "might be in possession of a firearm." Dep. Hagie knew that Canipe had been convicted of arson and that he had attempted to stab another officer in the past. Dep. Hagie learned he was due to check in with his probation officer, so he decided to intercept him there. He found Hagie there, called for backup, and followed him. Seeing that Canipe was not wearing a seat belt, Dep. Hagie made a traffic stop. (He later conceded that the stop was really to determine if Canipe had a weapon.) It took him at least 15 minutes to write the citation, which Hagie claimed was normal for that time of day. Within a short time, a total of four officers were at the scene of the traffic stop.

When Canipe signed the citation, Hagie returned all his documents. He then asked if Canipe had anything unlawful in the vehicle, which Canipe denied. Hagie asked for consent and Canipe agreed to both a frisk and a search of the car.

> While an officer stood with Canipe between the rear of the truck and the front of Hagie's cruiser – a "short distance" of about ten feet between the two vehicles – Hagie and Officer Bevins searched the truck. Hagie found a closed metal box resembling a tackle box on the front floor of the passenger seat and observed the corner of a second plastic box protruding from beneath the seat. When he moved the seat forward, Hagie discovered that the top of the second box was inscribed with the word "Ruger," which he knew was a company that manufactured firearms. Hagie opened the Ruger box, observed a handgun inside of it, and placed Canipe under arrest. (It was unclear whether the ammunition in the metal tackle box was found before or after the firearm.)

Canipe was given Miranda warnings, signed a waiver and "gave an incriminating statement." He requested suppression, and was denied. Canipe appealed.

ISSUE: Does asking consent to search require reasonable suspicion?

HOLDING: No

DISCUSSION: First, Canipe argued that "Hagie's conduct, unaccompanied by evidence of any other criminal act, exceeded what was reasonably related to the circumstances justifying a typical stop for failure to wear a seatbelt." The Court noted that Canipe did not question the lawful nature of the initial stop and that Hagie's underlying motivation "did not undermine its constitutionality."[114] However, it continued, stating that "a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution."[115] As an example, "[a] lawful traffic stop may become an impermissible seizure if it occurs over an unreasonable period of time or under unreasonable circumstances.'"[116]

The Court looked to the case of U.S. v. Erwin, which noted that "the Constitution does not mandate that a driver, after being lawfully detained, must be released and sent on his way without further questioning," just because the officer has "concluded the original purpose of the stop."[117] The Court addressed the "well-

[114] Whren v. U.S., 517 U.S. 806 (1996).
[115] Illinois v. Caballes, 543 U.S. 405 (2005).
[116] See Ellis
[117] 155 F.3d 818 (6th Cir. 1998)

established precedent" that "[a] law enforcement officer does not violate the Fourth Amendment merely by approaching an individual, even when there is no reasonable suspicion that a crime has been committed, and asking him whether he is willing to answer some questions."[118] That rationale extends to a request to search a vehicle, as well.[119] It does not matter that the officer have a "valid suspicion of wrongdoing." However, absent reasonable suspicion of criminal activity, a law enforcement officer must allow an individual to leave if he so requests and any consent obtained by the officer's refusal to permit him to do so is invalid.[120]

Fourth Amendment scrutiny is only triggered when an encounter "loses its consensual nature." In this case, the Court agreed that "Hagie's continued detention and questioning of Canipe" was reasonably based upon the reliable information he'd received from a close relative of Canipe. The stop was of a reasonable duration and Hagie's request for consent was simple and straightforward. The Court agreed the stop and the continued detention was reasonable.

Canipe also argued that his "purported consent to search was invalid," characterizing it as a "mere expression of approval" or an "acquiescence," rather than an "unequivocal, specific, and intelligent consent." The Court noted that the trial court had "astutely observed" that Canipe had a criminal history and was "no stranger to the police or the criminal justice system." As such, he could be presumed to know what he was doing. Finally, Canipe argued that the scope of the search was exceeded, and that he'd only agreed to the officers "looking" in his truck, not "to move seats or open containers." However, the officers did not break into or pry open locked containers. He complained he could not see the search, but the Court noted that he was standing only about ten feet from the truck. The Court agreed that stating that an officer might look into a vehicle conveys a general consent to search when the individual does not specifically limit that search. The Court found it significant that the firearms box was "inscribed, in plain view, with the name of a familiar firearms manufacturer, thereby rendering its incriminating contents immediately apparent … and further justifying Hagie's decision to open the box."[121] Canipe could have stopped or limited the search at any time, but made no effort to do so.

Canipe's conviction was affirmed.

U.S. v. Stanley, 2009 WL 3644634 (6th Cir. 2009)

FACTS: Although the opinion did not give specific facts, apparently Stanley was arrested under a warrant at his girlfriend's apartment. The girlfriend apparently gave consent to a search, and Stanley, although present, did not object or revoke the consent. He was given Miranda and invoked those rights and argued that should have been interpreted as an "express refusal of consent to search."

Stanley requested suppression. The District Court ruled that the girlfriend's consent was sufficient to permit the officers to search the apartment, where incriminating items were located (apparently, from the charges, guns and cocaine). Stanley appealed.

ISSUE: May officers search pursuant to a consent by a co-occupant?

HOLDING: Yes

[118] Erwin; Florida v. Royer, 460 U.S. 491 (1983)
[119] U.S. v. Dunson, 940 F.2d 989 (6th Cir. 1991).
[120] Florida v. Bostick, 501 U.S. 429 (1991).
[121] U.S. v. Campbell, 549 F.3d 364 (6th Cir. 2008).

DISCUSSION: The Court started by noting that an "arrest warrant allows officers to enter the suspect's home if there is 'reason to believe' that the suspect is within the home."[122] The officers had a lawful arrest warrant and investigation had "demonstrated that Stanley frequently stayed overnight in [the girlfriend's] apartment." They had observed him arrive the night before and his vehicle was still there the next morning, when the warrant was executed. As such, they had "reason to believe" he was there. Once they entered, the officers observed marijuana in glass vials and immediately recognized it as contraband. Once they seized it, the crack cocaine, "situated directly under the vials," was in plain view and likewise subject to seizure. Stanley also argued that there was also a knock and announce violation but the District Court ruled that the officers did knock and announce. They only forced entry after waiting a reasonable time and getting no response from inside.

The District Court's ruling to allow the evidence was upheld.

SEARCH & SEIZURE - APPARENT AUTHORITY

U.S. v. Penney, 576 F.3d 297 (6th Cir. 2009)

FACTS: Penney lived in Soddy-Daisy, Tennessee, and ran a local bar. He had a "tempestuous relationship" with Bowman and she lived with him "off and on." "Soddy-Daisy police officers were no strangers to Penney's residence, where they were called on the 'numerous occasions' when the relationship … turned violent." On August 19, 2003, after a quarrel, "a barefoot Bowman hitch-hiked to the Soddy-Daisy police station to file a complaint for assault against Penney." Penney arrived and insisted that the police remove Bowman from his residence. Penney was arrested. As they processed the complaint, Bowman "offered information about narcotics in Penney's house." She gave Det. Sneed written consent to search.

Bowman accompanied the officers to the house. She did not have a key to the front door so she went to the back door, which she was able to open without a key. (Sneed later learned that there was a special trick to open that door.) She led them around the house, pointing out contraband as she collected her own belongings. They found guns, cash, scales and illegal narcotics, some from containers. They searched outside and found a rifle in a truck and a shotgun in the chicken house.

After Penney's release the next day, he returned to the station to ask about his guns. He was told they were confiscated during the search. He told the officers that Bowman had no authority to consent as she did not live at the house. As a result of the interaction, the local police and the ATF opened an investigation, and connected Penney with drug trafficking. As a result of an intercepted conversation with a CI, Det. Sneed obtained an anticipatory search warrant to be executed after Penney met with the CI to make a transaction. When the CI gave the signal, the officers all moved in to execute the warrant. Although the arrest became violent, Penney was taken into custody. Several officers were injured during the apprehension. Guns and money were found in the house, but no drugs.

Penney was indicted on a variety of charges. He was convicted of drug charges and an attempt to kill a federal officer (during the arrest). Penney appealed.

ISSUE: May an apparent live-in girlfriend give consent to a search?

HOLDING: Yes

[122] Payton v. New York, 445 U.S. 573 (U.S. 1980).

DISCUSSION: Among a variety of other issues, Penney argued that since Bowman lacked authority to give consent, the fruits of that search must be suppressed. The Court noted, however, that a "co-occupant's 'common authority' depends not on property rights, but 'on mutual use of the property by persons generally having joint access or control for most purposes."[123] But even if the individual does not have authority, the search will be valid if the police "reasonably believed" that they did. Penney argued that at most, Bowman was an overnight guest who had been stripped of that status prior to the search, and that "she did not own or have control over the chicken house or the closed containers that were opened during the search." Further, the officers had "actual notice" that Bowman did not live with Penney and her co-occupancy had been terminated, because she did not have a key.

The Court reviewed what was known to the Soddy-Daisy police:

> Bowman and Penney had been involved in an off-and-on relationship for approximately six years. When the relationship was on, Bowman lived with Penney, which the police officers knew from their numerous visits to the Dayton Pike residence on domestic violence calls. When the relationship was off, Bowman would leave Penney's place. During these periods she resided with her mother, whose address she listed on her August 19, 2003 complaint against Penney. The officers' most recent visit to Penney's residence connected to the couple's turbulent relations occurred on August 2, 2003, as a result of which Penney had kicked Bowman out. Detective Sneed testified that he did not think Bowman was staying at Penney's at the conclusion of the August 2, 2003 incident.
>
> On August 19, however, when Bowman arrived at the Soddy-Daisy police station, Bowman told Sneed that although the couple has broken up six months ago, they had now reconciled and that she had moved back in the day before. That morning, in the heat of argument, Penney kicked Bowman out without giving her a chance to collect shoes or her car keys. Bowman then hitched a ride with a passing motorist to the police station.
>
> Once at the residence with Bowman, officers observed further evidence that she was not a mere overnight guest at Penney's house. Bowman's car was parked outside the residence, consistent with her account of that morning's events. She led officers through the residence and picked up her belongings from drawers, a laundry basket, and the washing machine, which she gathered into "several bags." She showed police officers firearms, most of which were in plain view, and identified particular unlocked, unlabelled containers that she knew held narcotics. Bowman told the police that she fed and took care of the chickens when Penney was not there, that she took care of "things around the house," and that she wrote Penney's checks.

The trial court found it was reasonable for the officers to believe that Bowman had authority, and noted, in particular that it was "reasonable for the police not to investigate 'whether Bowman's name was on the lease "as it is a reality in today's world that consenting adults often co-habitat [sic] together without benefit of legal formalities – including those formalities relating to the establishment of property interests.'" The Court noted that it had "confirmed a number of times that a live-in girlfriend has common authority over the premises wherein she cohabits with a boyfriend."[124] Such "cohabitation need not be uninterrupted to support a

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[123] Illinois v. Rodriguez, 497 U.S. 177 (1990).

[124] See, e.g., U.S. v. Grayer, 232 F. App'x 446, 449 (6th Cir. 2007); U.S. v. Hudson, 405 F.3d 425, 442 (6th Cir. 2005); U.S. v. Gillis, 358 F.3d 386, 391 (6th Cir. 2004); U.S. v. Moore, 917 F.2d 215, 223 (6th Cir. 1990).

reasonable belief in common authority." In some cases, the court had accepted that an individual could reside at more than one location. The Court paid little heed that "Bowman listed her mother's address on her complaint form" since the "absence of formalized property rights does not automatically translate in the absence of common authority."[125]

The Court did examine Penney's "demand that Bowman be removed from his residence" but agreed that the "particular facts" the officers had about this situation was important. "The officers knew of numerous occasions when the couple has quarreled violently and reconciled, and had no reason to think that the quarrel of August 19 was any different. Lovers' quarrels and reconciliations are as much of a 'reality in today's world' as is cohabitation without 'legal formalities,' and the police cannot be faulted for not presuming that a particular quarrel put an end to the couple's relationship and living arrangements." With respect to her lack of having a key, the Court agreed this was "hardly surprising in view of the circumstances: Bowman did not have a chance to even collect her shoes, let alone pick up a key." Finally the Court noted that since Penney wasn't present (because he was in jail), he simply "lost out" of the opportunity to object to the consent given by Bowman. The Court agreed that Bowman had authority and access to the closed containers and thus could give consent. (The trial court had excluded the weapon found in the truck, finding that she did not have authority to consent to that search, however.)

Penney also argued that the proceeds from the anticipatory warrant should be suppressed because first, the triggering event never actually occurred and second, there was an "insufficient nexus between Penney's residence and the contraband to support probable cause." While it was true the actual triggering event did not occur, the Court found that what did occur was sufficient to justify the search. The Court noted that:

> … anticipatory search warrants are typically sought to conduct searches triggered by a police-controlled delivery of contraband when there is little or no evidence connecting the place to be searched with evidence of a crime.[126] That a magistrate may rely on information in the affidavit other than the facts regarding the anticipated event in the context of an anticipatory search warrant is undisputed. Federal courts, including ours, have relied on such information to uphold a broader scope for the search than would be justified on the basis of the "triggering" controlled delivery alone.[127] This warrant was not a typical anticipatory warrant, however, and the Court found that there was more than sufficient cause to connect Penney and his home to drug trafficking

On a separate issue, the Court had disallowed a statement made by Penney some 15 minutes into his arrest and after he realized he'd shot an officer. The Court found that the statement did not qualify as an excited utterance, because sufficient time had passed for Penney to have realized the seriousness of what he had done, and to have reason to try to develop a story that would mitigate it.

Penney's conviction and sentence were affirmed.

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[125] Matlock.

[126] U.S. v. Penney,

[127] See, e.g., U.S. v. Rey, 923 F.2d 1217, 1220 (6th Cir. 1991) (holding that "indications of prior illicit activity," besides the controlled delivery, justified a search beyond "the seizure of the controlled delivery package"); U.S. v. Garcia, 882 F.2d 699, 704 (2d Cir. 1989) (holding that "additional facts in the supporting affidavit gave rise to probable cause to believe that the apartment was being used as a storage and distribution center for drugs," authorizing a broader search than may have been justified by the delivery of contraband alone).other than the contraband to be delivered."

SEARCH & SEIZURE - TERRY STOPS

U.S. v. Muhammad, 2009 WL 605333 (6th Cir. 2009)

FACTS: On May 7, 2003, Officer Jones (Memphis, TN, PD) was dispatched to "investigate a group of young men who were loitering outside the apartment complex and playing loud music" at the Pershing Park Apartments. The area had experienced loitering and burglary problems. As Officer Jones and another officer arrived, in separate cars, he spotted three young men in the parking lot and instructed them to "stay where they were." One, Muhammad, walked toward the building, despite commands not to do so, and entered. Jones could see him though glass doors, and watched Muhamma go up the stairs, bend over, and then return to where Officer Jones was located. Officer Jones frisked Muhammad, apparently finding nothing. He then went to the location where he'd seen Muhammad bend over and found a .22 pistol on the landing. Officer Jones questioned Muhammad, and he admitted (after waiving his rights) that he had possessed the weapon and was a convicted felon. Officer Jones cited him, and Muhammad was later formally charged and indicted on the offense. He moved for suppression but was denied. Upon conviction, he appealed.

ISSUE: Does a series of suspicious, albeit non-criminal, actions satisfy reasonable suspicion for a stop?

HOLDING: Yes

DISCUSSION: Muhammad first argued that the initial stop violated the Fourth Amendment. The Court reviewed what Officer Jones knew at the time of the stop and agreed that he had "a reasonable basis to suspect that Muhammad was involved in criminal activity." The Court detailed the information shared in the initial call, Jones's personal observations at the scene, and Muhammad's evasive behavior. Further, the Court upheld the admission of his inculpatory statements.

Muhammad's conviction was affirmed.

U.S. v. Keith, 559 F.3d 499 (6th Cir. 2009)

FACTS: On March 29, 2006, at about 1:45 a.m., Officers Ripberger and Stephens (Newport PD) were assisting with an unrelated arrest. They were "standing n a corner next to multiple marked police cars with their lights flashing." About 150 feet away was "Big Daddy's," a liquor store, on the opposite corner of the intersection. They could see two sides of the building. Although they were not surveilling the building, they could see the store clearly. The officers knew that the store "sold certain items that could be used to smoke crack cocaine, including filters and glass vials." Officer Ripberger considered the parking lot to be a "high drug trafficking crime area." As the watched, they spotted a man on foot (Crawford) approach a vehicle at the drive-through window.[128] Keith was in the driver's seat. They spoke for a few moments. The car pulled away, drove across the parking lot in the front of the store, turned again and drove down the side, which was out of the sight of the officers. The officers knew there was a parking area and a dumpster in that location. The Court noted that although the officers spoke of Keith going behind the building, in fact, he was on the side. Crawford walked in the same direction, looking back at the officers. Both Crawford and Keith's vehicle were out of the officers' sight for "just a few seconds." The officers suspected a drug deal or an exchange of alcohol, so they followed.

[128] Although the officers were uncertain if the vehicle left before approaching the window, the court accepted that Keith did not leave before getting to the drive-through window and presumably making a purchase.

Officer Ripberger stopped Keith "based solely on his suspicion that some kind of criminal activity had occurred in the few seconds that the officers had lost sight" of the pair. (He observed no traffic violation.) He checked Keith's OL and discovered it to be suspended, and also saw marijuana in plain view. Upon searching the car, he found a gun, and a later body-cavity searched revealed a small amount of cocaine. (Officer Stephens had also stopped Crawford and finding nothing, let him go.)

Keith was charged with drug and weapons charges. He requested suppression and was denied. Keith then took a conditional guilty plea and appealed.

ISSUE: Is simply acting "suspicious" sufficient to justify a Terry stop?

HOLDING: No

DISCUSSION: Keith argued that the undisputed facts did not provide sufficient cause to make the initial stop. The Court noted that a "Terry stop is permissible only if law enforcement officers had a 'particularized and objective basis for suspecting the particular person stopped of criminal activity.'"[129] Further, the officer must be "aware of specific and articulable facts which gave rise to reasonable suspicion."[130] Just looking suspicious in a high drug trafficking area was not enough.[131] Further, "an officers must not act on an 'inchoate and unparticularized suspicion or hunch,' but [on] the specific reasonable inferences [] which he is entitled to draw from the facts in light of his experience."[132]

The Court reviewed the facts of a number of similar cases for guidance. The Court noted that Officer Ripberger found nothing odd about Keith's presence at the store, as it was a "kind of a popular place." The officer had not, apparently, "actually made drug-related arrests in the parking lot or witnessed drug transactions there in the past." The Court gave little weight to his belief that it was odd for someone to approach a driver at a drive-through window, as it was based only upon his own, personal experience." In addition, the Court found it unremarkable that Crawford looked over to the "nearby police cars with flashing lights at that time of the night," as even the prosecutor conceded "that he, too, would likely have looked over toward the spectacle on the opposite corner." The Court found that the behavior of the two men was "more ambiguous than the examples of 'evasion' that have contributed to findings of reasonable suspicion in other cases."[133] The Court was "not convinced that the manner in which Keith and Crawford" acted or their presence at the store was sufficient to create "reasonable suspicion of criminal conduct." The officers witnessed no even arguable illegal acts. The totality of the circumstances and the "sequence of events [were] insufficient to provide the officers with reasonable suspicion that a crime had been committed."

The Court reversed the decision to deny Keith's motion to suppression and remanded the case for further proceedings.

U.S. v. Brown, 310 Fed.Appx. 776 (6th Cir. 2009)

FACTS: On January 17, 2006, at about 8 p.m., Officer Carson (Memphis, TN, PD) was patrolling. She noticed Brown and another person in a convenience store parking lot; Brown was carrying an open bottle of beer. She approached them in his car "intending to warn them to take their loitering and drinking elsewhere."

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[129] U.S. v. Cortez, 449 U.S. 411 (1981)
[130] U.S. v. Davis, 514 F.3d 596 (6th Cir. 2008).
[131] Brown v. Texas, 443 U.S. 47 (1979); Illinois v. Wardlow, 528 U.S. 119 (2000)
[132] U.S. v. Urrieta, 520 F.3d 569 (6th Cir. 2008),
[133] U.S. v. Patterson, 340 F.3d 368 (6th Cir. 2003)

The individual with Brown responded politely, but "Brown, however, immediately began to act suspiciously." He did not respond verbally, avoided eye contact, and turned to walk away as if he had not heard her. He also "placed his hand over the back right pocket of his pants and left it hovering there."

Becoming suspicious, Officer Carson got out of her vehicle, "instructed Brown to place his hands on a nearby vehicle and spread his legs, and conducted a pat-down for officer safety." She found nothing and asked Brown about ID. He told her it was in his back right pocket, and she told him she was going to remove it so he could provide ID. As she reached for it, Carson spotted a gun. "Carson immediately handcuffed Brown, retrieved the weapon, called for back-up, placed Brown in the back of the squad car, and had dispatch run a check on both Brown and the weapon." Finding Brown had an outstanding warrant, she arrested him

Brown was indicted for possession of the of gun, as he was a convicted felon. Brown moved for suppression, and was denied, with the Court noting that carrying the open container violated local ordinance which justified the investigation.

Brown was convicted and appealed.

ISSUE: Does an officer need reasonable suspicion to approach and speak to a subject?

HOLDING: No

DISCUSSION: First, the Court reviewed whether the stop was based upon reasonable suspicion. The Court noted that all "that is required to justify a Terry-level search or seizure is 'some minimal level of objective justification.'"[134] The Court found "nothing objectionable about Officer Carson's initial contact with Brown and his companion in the parking lot." In fact, the Court noted, the officer "did not need reasonable suspicion of criminal activity to justify her approaching Brown and the other individual for the purpose of telling them to take their activities elsewhere." Further, "[i]n this case, not only was Brown free to leave, but Officer Carson told him to do so." The "consensual nature of this interaction did not change merely by virtue of Officer Carson's asking Brown his name." The Court agreed, as well, that Officer Carson had reasonable suspicion that "Brown was engaging in legal wrongdoing," given that "objective circumstances justified the stop, an issue that does not turn on the state of mind of the individual officer." The Court cited a "number of particularized and objective bases for suspecting wrongdoing: Brown's loitering in the parking lot; the time of night (after 8 pm); the fact that she had made numerous arrests in that same parking lot; Brown's failure to respond to or make eye contact with her; Brown's attempting simply to walk away rather than respond; and Brown's placing his hand over his back-right pocket as he walked away."

Brown contended that the "pat-down was illegal" … because – as Officer Carson testified – she conducted it as a matter of course, and she did not indicate that she had any belief that Brown was dangerous. He also argued that the "removal of the wallet was illegal because it amounted to a search, and Officer Carson had neither probable cause nor consent to justify the search." The Court, however, supported her "reasonable belief that her safety was in jeopardy: it was late at night, she was alone, Brown was acting nervously and evasively, and, as the district court found, Brown made a furtive gesture towards his back pocket as he tried to leave the scene." The Court agreed the patdown and the removal of the wallet was "out of concern for her own safety, and [the] 'search' was no broader than necessary to ensure that Brown did not have access to any weapon."

Brown's conviction was affirmed.

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[134] INS v. Delgado, 466 U.S. 210 (1984).

U.S. v. Bell, 555 F.3d 535 (6th Cir. 2009)

FACTS: On February 1, 2006, Trooper Roberts and Sgt. Helton (Ohio State Highway Patrol) were monitoring traffic. At about 12:57 p.m., they clocked Bell going 80 mph in a 65 mph zone and stopped him. When asked for his documents, Bell told the trooper that the vehicle was a rental. He explained the reason for his travel, and Trooper Roberts later testified that his story "sounded rehearsed" because "he repeated that story several times" in essentially the same way. Bell also kept his cell phone on his lap and didn't make eye contact with the trooper. Trooper Roberts later stated that Bell was "overly cooperative," which he found abnormal, and that he found Bell "very deceptive." While waiting for the computer check, the two troopers discussed Bell's actions. After about three minutes, they summoned a police drug dog to the scene. Sgt. Helton advised Trooper Roberts to have Bell get out of the car "so that they would not have to worry about doing so when the dog handler arrived."

They learned that the car was rented to another person and that the agreement indicated that additional drivers could not be added without prior approval. When asked, Bell stated that his girlfriend rented the vehicle and had gotten permission over the phone for Bell to drive. During the time they were waiting for the computer check, Trooper Farabaugh arrived with the drug dog. After consultation, Trooper Roberts approached Bell's vehicle and had him step out so that Roberts could give him a warning for the speeding. He explained the drug dog was just "working the area" and would be allowed to "run around [the] car." The trooper later explained that had the dog not been available, he would have continued to attempt to contact the rental company. About 12 minutes into the stop, the dog started to sniff the car and within a minute, the dog alerted. The troopers searched the trunk and found four packages of crack cocaine.

Bell was arrested and indicted. He moved for suppression of the evidence and the statements, arguing that the troopers "impermissibly extended the length of the detention without reasonable suspicion of drug activity." When that was denied, Bell took a conditional guilty plea and appealed.

ISSUE: May officers detain subjects during a traffic stop to do computer checks?

HOLDING: Yes

DISCUSSION: Bell did not contest that that speeding stop was lawful, but argued that the troopers "unlawfully exceeded the purpose of the initial stop without reasonable suspicion of further criminal activity." The Court agreed that troopers did not have "reasonable suspicion of drug activity," but ruled that was not needed because they "did not improperly extend the duration of the detention to enable the dog sniff." The Court found the reasons enumerated by the troopers for the stop to be weak, at best. However, the Court found that the trooper could "lawfully detain the driver of a vehicle until after the officer has finished making record radio checks and issuing a citation, because this activity 'would be well within the bounds of the initial stop.'"[135] The Court agreed that it was, in fact, shorter than the average traffic stop.

The Court agreed that he was detained no "longer than reasonably necessary for the Officers to complete the purpose of the stop in this case." The troopers were "waiting for the results of the background check," so "any time that the Officers spent in pursing other matters while the background check was processing, even if those matters were unrelated to the original purpose of the stop, did not extend the length of the stop." The trooper was writing the citation when the dog alerted. The Court found the inquiry about Bell's right to operate the car was "within the purpose of the initial stop." The Court found that it simply could not "conclude that an

[135] U.S. v. Wellman, 185 F.3d 651 (6th Cir. 1999); U.S. v. Bradshaw, 102 F.3d 204 (6th Cir. 1996).

officer violates the Fourth Amendment merely by asking a driver to exit a vehicle to effect a dog sniff when doing so does not extend the duration of the stop and does not cause the officer unreasonably to deviate from the purpose of the initial stop."

The Court upheld the denial of the motion to suppress the conditional guilty plea.

U.S. v. Craig, 306 Fed.Appx. 256 (6th Cir. 2009)

FACTS: On August 14, 2007, Webb, a Veteran's Hospital employee in Johnson City, Tennessee, spotted two men loitering near the employee parking lot. She was aware that several vehicles had been stolen from the lot in the preceding months. Finding their attire (shorts and tank tops) and lack of employee ID cards suspicious, she watched one man remove an item she believed to be a tool box from a vehicle and tuck the item under his shirt. She called the VAMC police, who put out an "all call." Within a minute, two marked police vehicles arrived at the lot, where Webb was still watching the suspects. She had watched them get into a specific vehicle and pointed that out to the arriving officers. The two men tried to leave, and the officers' "suspicions were aroused by the unusual, seemingly evasive route taken by" the vehicle. One of the officers finally got them to stop, and he "could see what he considered to be unusual items inside, including a police scanner, ties covered by a tarp, and various tools in the passenger-side floorboard." He stated later that both displayed "extremely nervous demeanor[s]."

One of the suspects, Jerry Craig, stated he was a veteran doing physical rehab, but indicated the wrong building. Both Jerry and Bradley Craig were arrested and separated. Jerry Craig gave consent to search the vehicle, stating that he owned it. The search "yielded two loaded pistols, one on the passenger floorboard and the other within reach of the driver's seat." They also found "ammunition, automotive key cutters, blank automotive keys and lock cores, wheels and wheel covers that did not match" their vehicle, and "other stolen property." They were given Miranda and arrested for possession of the firearms on the federal VAMC property.

Both Craigs moved for suppression of the evidence found. The District Court ruled against them, so they both took a conditional guilty plea and appealed.

ISSUE: Does reasonable suspicion, without an observation of overtly criminal acts, support a Terry stop?

HOLDING: Yes

DISCUSSION: Both argued that the officers "lacked reasonable suspicion that criminal activity was afoot." The Court reviewed the standard and noted that reasonable suspicion is considered under the totality of the circumstances, and can be "gleaned from the investigating officer's own direct observations, dispatch information, directions from other officers, and the nature of the area and time of day during which the suspicious activity occurred."[136] "Furtive movements made in response to a police presence" is also a factor.[137] Finally, reliable tips are also valuable. The Craigs argued that the stop was based on the "vague 'gut instinct' of a citizen informant," which was then "embellished in a police dispatch and misreported to the officers." Webb admitted that "she did not see [the Craigs] do anything overtly illegal." The Court, however, found that the observations of Webb and the officers, "when considered along with the dispatch and other contextual considerations, supplied the requisite reasonable suspicion for the stop."

[136] See Dorsey v. Barber, 517 F.3d 389 (6th Cir. 2008).
[137] U.S. v. Caruthers, 458 F.3d 459 (6th Cir. 2006).

Webb's conditional guilty plea was affirmed.

U.S. v. Johnson, 2009 WL 2105547 (6th Cir. 2009)

FACTS: On October 16, 2006, Terry Johnson, along with his brother, Steve, were driving in Steve's pickup truck in Mansfield, Ohio. They stopped to talk to friends standing on the sidewalk. Deputies Coughenbaugh and Snay (Richland County Sheriff's Office) passed by in the opposite direction. They checked the license plate and discovered a possible arrest warrant for Steve, so they turned around and headed back. They found it at an auto parts store and went inside. When they asked about the owner, Steve identified himself. They confirmed his identity and took him outside; Terry followed. Steve handled Terry his personal belongings and Terry went back inside. Deputy Coughenbaugh pointed out to Deputy Snay that Terry had been driving, so Snay went back inside and asked Terry for his OL. Terry replied he didn't have it with him, and provided his Social Security number. Snay discovered Terry's license was suspended and decided to arrest him. He noticed that Terry was nervous and bladed his body. Snay handcuffed Terry, whereupon Terry stated he had a handgun. Snay found the gun and cocaine.

Terry Johnson was indicated on drug possession with the intent to distribute and being in possession of the firearm, as he was a felon. He moved for suppression and was denied. He then took a conditional guilty plea and appealed.

ISSUE: Is asking for ID a Fourth Amendment Seizure?

HOLDING: No

DISCUSSION: Johnson argued that the deputy "lacked reasonable suspicion to ask him for his driver's license." The Court noted, however, that simply asking for ID does not make an encounter a Fourth Amendment seizure.[138] The Court noted that just because his brother was arrested, Terry Johnson should not have felt constrained by the officer. The officers did not issue any orders to him. Nothing indicated that the deputy "raised his voice, displayed a weapon, restricted Terry's movement, accused Terry of a crime, or otherwise made a display of authority that would have indicated that Terry was not free to end the encounter." Once the deputy learned Johnson's license was suspended, he had probable cause to make the arrest and the search was then a valid search incident to arrest.

The Court upheld the denial of the motion to suppress and Johnson's plea.

U.S. v. Flores, 571 F.3d 541 (6th Cir. 2009)

FACTS: Organized crime task force officers in Akron, Ohio were investigating Spragling. They monitored several of his communications with associates and identified a location as a "stash house." The traced one transaction back to an individual and they determined that a transaction was going to occur at the house. There, they found a unfamiliar vehicle, which was registered to Flores, "who was also unfamiliar to the agents." They monitored the residence and followed the vehicle when it left. When the vehicle pulled onto the highway, the officers decided to stop it. Sgt. Malick, "who initiated the traffic stop, admitted that neither the driver nor the Jeep was in violation of any traffic laws." Flores, the driver, gave consent, and the officers found more than $20,000 in cash, wrapped in plastic, in a duffel bag on the backseat. A drug dog alerted on the bag but no drugs "beyond trace amounts" were found. The officers confiscated the cash but allowed him

[138] I.N.S. v. Delgado, 466 U.S. 210 (1984).

to leave. Three days later, another officer found his vehicle at the airport and put a tracking device on it, thereby uncovering more incriminating evidence.

Flores was arrested and charged. He moved for suppression and was denied. He then took a conditional guilty plea and appealed.

ISSUE: May a combination of clues be used to satisfy reasonable suspicion for a stop?

HOLDING: Yes

DISCUSSION: Flores argued that the officers "lacked reasonable suspicion to stop his vehicle because the only fact upon which they relied to conduct their search was that he 'exited from a house which they believed to be used for stashing drugs.'" The Court noted that there had "been a lengthy investigation into the illegal activities of Spragling, who was believed to be the leader of a major drug-trafficking ring" and which led back to the residence as being a drug house. The Court agreed that "contrary to what Flores claims, the agents did not rely solely on the fact that he had emerged from the residence," but instead were suspicious because of the "intercepted conversations indicating that a drug delivery was about to take place, their reasonable belief that 'The Spot' was a location where Spragling and his associates stashed drugs and money, and the unfamiliar Jeep in the driveway of the house at the time of the scheduled delivery." Although they had no description of the person believed to be making the transaction, they certainly had enough to satisfy the reasonable suspicion standard.

The Court upheld the denial of the motion to suppression.

U.S. v. See, 2009 WL 2610816 (6th Cir. 2009)

FACTS: On April 22, 2007, See and two men were sitting in See's car, at about 4:30 a.m. They were parked in a Cleveland public housing complex. Officer Williams (Cleveland Metro Housing Authority) parked his patrol car in such a way that See could not drive away. Williams later stated that he noticed the vehicle because he "saw three men sitting in an unlit car that was backed into a parking space in a dimly lit part of the parking lot farther from the building than other vacant spots." At some point, he noticed the vehicle lacked a required front license plate – but upon checking, he saw it had valid temporary tags.

As a result of a search, Williams found a firearm, for which he arrested See, a convicted felon. See moved for suppression and was denied. See then appealed.

ISSUE: Is simply a presence in a high crime area sufficient to make a Terry stop?

HOLDING: No

DISCUSSION: The Court agreed that the blocking in of See's car was a Terry stop. The Court also agreed that "[g]iven the fact that Williams blocked See's car with his marked patrol car" that " a reasonable person in See's position would not have felt free to leave.'" The Court concluded, however, that the stop "was not supported by reasonable suspicion." See's presence in a high crime area was not enough to justify reasonable suspicion, nor was the time of day, alone, enough. The Court noted that Williams could certainly have "pursued a consensual encounter." Since the stop was improper, the fruit of the stop must be suppressed, as it was the "direct result of the initial, unlawful Terry stop.

The Court reversed the decision not to suppress the gun.

SEARCH & SEIZURE - VEHICLE STOP

U.S. v. Jemison, 310 Fed.Appx. 866 (6th Cir. 2009)

FACTS: On June 23, 2006, Officer Slatkovsky (Cleveland PD) "heard loud music coming from an approaching vehicle." He pulled over the vehicle, and when Jemison, the driver, reached into a console, the officer spotted a handgun. Jemison showed a suspended OL, but stated that he had paperwork that permitted him to drive. He was unable to produce the paperwork.

Jemison was arrested and given Miranda warnings. The officer retrieved the gun and found a "plastic bag containing pills of unknown origin." He decided to tow the car and during an inventory, he found an illegal amplifier and a "zipped bag" in the trunk. He found cocaine in the bag.

Jemison later denied that his music was too loud and that he opened the console in the officer's presence. Two days after the arrest, he was questioned about the drugs and essentially admitted to its possession.

He was indicted and eventually convicted. He then appealed.

ISSUE: Is a traffic stop based upon a reasonable mistake in belief about a statute permissible to admit evidence found during the stop?

HOLDING: Yes

DISCUSSION: Jemison argued that the stop was invalid because he had committed no offense, and that the officer "could not point to the law for the ticket he issued." He pointed to U.S. v. Goodwin, in which a Kentucky officer did not issue a citation for the purported offense and could not "identify any local ordinance or Kentucky statute" that indicated Goodwin was "engaged in a traffic violation at the time of the stop."[139] In that case, the evidence was suppressed. The Court, however, indicated that in this situation, the officer properly identified a valid ordinance and described why he believed Jemison was in violation of that ordinance.

With respect to the inventory, the Court found that the officers may do such inventory searches when they are "pursuant to standardized procedures."[140] Jemison argued the bag was locked but presented no evidence to that effect. No policy was introduced, but neither did Jemison request such production. The officer testified as to the parameters of the agency's policy and the Court agreed the search was valid.

Finally, Jemison argued that his right to remain silent was violated when he was questioned by a second officer, some time after his arrest. Jemison argued that his decision to remain silent after the arresting officer gave him Miranda was an invocation, but the court found no authority that suggested that "mere silence" was such an invocation. The Court agreed it was not error to admit his later, incriminating statement. The Court also upheld the admission of expert testimony from an experienced narcotics officer about drug trafficking.

Jemison's conviction was affirmed.

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[139] U.S. v. Goodwin, 202 F.3d 270 (6th Cir. 2009)
[140] Florida v. Wells, 495 U.S. 1 (1990): U.S. v. Tackett, 486 F.3d 230 (6th Cir. 2007).

U.S. v. Davis, 326 Fed.Appx. 351 (6th Cir. 2009)

FACTS: On January 13, 2006, at about 0210, Davis was driving outside Detroit, Michigan. Officer Griffin (Wesland, MI, PD) spotted a Tweety-Bird air freshener hanging from the rearview mirror so he stopped him for a violation of Michigan law, which prohibits dangling items that obstruct the view of the driver. Davis admitted he did not have a license and he was arrested. During the search of the vehicle, the officer found a stun gun, cash, an open bottle of cognac and baggies containing more than 23 grams of cocaine base. He also found a gun, which Davis had told him was in the car.

Davis, a felon, was charged for the gun and the drugs. He requested suppression but was denied. Davis took a conditional guilty plea, and appealed.

ISSUE: Is a traffic stop for a minor traffic offense permitted?

HOLDING: Yes

DISCUSSION: The Court agreed that given the broad scope of the Michigan statute, the stop was legally justified. The decision of the trial court was affirmed.

U.S. v. Jones, 562 F.3d 768 (6th Cir. 2009)

FACTS: On Nov. 29, 2006, Det. Mattingly (Louisville Metro PD) was patrolling a high drug crime area in Louisville. He watched a vehicle stop in front of a suspect house. One of the passengers, Jones, got out and went into the house - which turned out to be his mother's house. Jones emerged and got back into the car. Believing what he saw was "flagging," Mattingly pulled up in front to block the vehicle in and Det. McKinney arrived to assist in the stop. Both were in unmarked cars, but McKinney turned on his emergency lights.

Jones jumped out of the back seat. Mattingly identified himself and told Jones to stop, and Jones did. He frisked Jones and found two handguns, the second of which was reported stolen. He also found marijuana on Jones's person, and in the vehicle. Jones was arrested and eventually charged with possession of the gun. (He was a felon.) He moved for suppression and the trial court agreed, but it did not release Jones, apparently in anticipation of further criminal charges. Both sides appealed.

ISSUE: Is suspect (although ultimately innocent) behavior sufficient to support a vehicle stop?

HOLDING: Yes

DISCUSSION: The Court stated, "the manner in which officers Mattingly and McKinney originally approached the Nissan is not suggestive of a consensual encounter." Further, "a warrantless 'seizure' had occurred at the time the Nissan was hemmed in by the unmarked police vehicles." The Court noted, in a footnote, that the record indicated that the occupants did not necessarily understand that they were dealing with law enforcement officers. The Court agreed that once Jones submitted, he was seized. The Court disagreed with the trial court, however, and ruled that it "should have considered all of Mattingly's observations up to the moment when Jones finally yielded to the unambiguous show of police authority." The Court noted that although flagging was not actually occurring, the behavior of the Nissan's occupant was certainly consistent with it. Further, the trial court ignored Mattingly's observation of a bulge in the front of Jones's sweatshirt (where one of the guns was hidden) and his other actions. The Court found those to be "critical observations,

suggesting the possible presence of a firearm in a confrontational setting, and calling for an immediate show of authority to neutralize potential danger and conduct further investigation."

The Court reversed the order to suppress the evidence and remanded the case back for further proceedings.

U.S. v. Lopez, 567 F.3d 755 (6th Cir. 2009)

FACTS: On September 27, 2006, Trooper Cromer (KSP) clocked Lopez driving 106 mph on I-75 in Rockcastle County. He chased and eventually arrested Lopez for reckless driving. After securing Lopez in the back of the cruiser, Trooper Cromer searched the passenger compartment of the car and found 73 grams of crack, scales and a loaded handgun.

Lopez was charged under federal law for drug trafficking and possession of the firearm while trafficking. He moved for suppression and the trial court denied the motion. Lopez took a conditional guilty plea and appealed.

ISSUE: Is a search of vehicle following an arrest permitted?

HOLDING: No (but see discussion)

DISCUSSION: The Court quickly agreed that driving at such a high rate of speed constituted reckless driving and that the arrest was therefore valid.

With respect to the search, however, the Court noted that at the time of the arrest, New York v. Belton[141] was controlling law and that the search was permitted. However, the Court noted:

> But the Supreme Court has since changed the law. In Arizona v. Gant[142], the Court held that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest."

The Court concluded that the Gant standard was not met in the case at bar, because Lopez was secured in the patrol car at the time of the search. Further, "[t]here was no reason to think that the vehicle contained evidence of the offense of arrest, since that offense was reckless driving." As such, the Court agreed that the search violated the Fourth Amendment under Gant and reversed the conviction. The case was then remanded to the trial court for further proceedings.

U.S. v. Hunter, 2009 WL 1491464 (6th Cir. 2009)

FACTS: On April 12, 2007, at about 1300, Det. Dill (Shelby Co. TN, SO) received information from a CI that Hunter "would be transporting a large quantity of methamphetamine" in a specific area and in a specific vehicle. Det. Dill later testified that the CI had provided good information in 6 or 7 earlier situations. Det. Dill informed local officers of the tip but did not attempt to get an arrest warrant. That evening several officers established surveillance. At about 2150, they spotted Hunter in the area in the identified vehicle. Det. Simonsen made a traffic stop and Hunter stopped his vehicle in the traffic lane. Det. Simonsen and Mays approached. Simonsen explained the reason for the stop, a cracked windshield, and asked him to get ouf of

[141] 453 U.S. 454 (1981)
[142] 556 U.S. ---, decided April 21, 2009.

the car so that the officers could get ouf of traffic - it was a two lane road. Hunter refused. Realizing that the car was not in park, Simonsen called for other officers to "step it up" because he thought Hunter was getting ready to run. Other officers arrived and blocked Hunter in.

Hunter was ordered out at gunpoint, but still refused, and "Simonsen and Mays physically removed him from the car." Simonsen grabbed Hunter's shorts to "pull them up" and a clear bag fell to the ground. They searched Hunter and found another similar bag in his groin area, and a small amount of marijuana. The substance in the clear bag appeared to be methamphetamine. Hunter was arrested, but he was never cited with the original traffic charge.

Hunter was indicted and moved for suppression. When that was denied, he took a conditional guilty plea, and appealed.

ISSUE: May a credible informant's tip provide reasonable suspicion for a traffic stop?

HOLDING: Yes

DISCUSSION: First, the Court looked as to whether the CI's tip provided, at least, reasonable suspicion to make the stop.[143] The Court agreed that the tip did provide the requisite level "particularized and objective basis" for suspecting Hunter of illegal activity. It was appropriate for the Court to accept Det. Dill's statement that the informant had proved credible in the past, even though he could not recollect details of prior dealings, since the information correctly predicted Hunter's whereabouts at a time in the future. As such, the Court need not consider whether the cracked windshield was a separate basis for the stop. The Court, however, noted that that did not end the inquiry. Once the purpose for a stop has been completed, the "motorist cannot be further detained unless something that occurred during the stop caused the officer to have a reasonable, articulable suspicion that criminal activity was afoot."[144] The Court agreed that the detective was justified in ordering Hunter from the car.[145] Once he was removed, and the drugs fell to the ground, the Court ruled that his seizure, and subsequent arrest, was justified under Plain View.

The Court upheld Hunter's plea.

U.S. v. Bonilla, 2009 WL 4906906 (6th Cir. 2009)

FACTS: In 2007, Bonilla was driving through Ohio in a vehicle with Colorado tags. Deputy Sheriff Bemis (Montgomery County TN SD) stopped him for following a truck too closely, at approximately 4:01 p.m. Bemis had been contacted by a Ohio State Highway Patrol trooper about Bonilla, and was told the trooper "had been following Bonilla for sixteen miles and observed suspicious activities," specifically, driving 10 miles under the limit, looking nervous and driving a large vehicle with out of state plates. Bemis did not observe any traffic offenses, however. Dep. Bemis ordered Bonilla to get out. Bonilla explained he was going to Columbus on vacation. Bonilla consented to a patdown. Bonilla also stated that the passenger was his girlfriend, but he "could not recall her last name and [said] had only known her for a little while." Bemis retrieved Bonilla's ID from the car and spoke to the passenger. Bonilla then "recalled his passenger's last name and said that he had known her for three years." The passenger stated they were going to Columbus to visit friends. Bemis found Bonilla's story to be nonsensical and decided he would have his K-9 do a "free-air" sniff.

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[143] See Delaware v. Prouse, 440 U.S. 648 (1979).
[144] U.S. v. Richardson, 385 F.3d 625 (6th Cir. 2004).
[145] See Pennsylvania v. Mimms, 434 U.S. 106 (1977); U.S. v. Wilson, 506 F.3d 488 (6th Cir. 2007).

At about 4:07, Bonilla was allowed to lean against the deputy's car while Bemis wrote the ticket and checked Bonilla's information. He also called for backup. The computer check took approximately 8 minutes, at which point Bemis apparently began to start writing the ticket and another form. At 4:23, backup arrived. "Bemis ceased writing the ticket, removed the passenger from the Avalanche, and placed Bonilla and the passenger in separate police vehicles." Bemis later claimed that it usually took 30-35 minutes to write an out-of-state driver a traffic ticket. He ran his dog around the car and the dog alerted. A subsequent search revealed 10 kilos of cocaine.

Bonilla was charged with federal drug trafficking offenses. He moved to suppress, and was denied. Bonilla then took a conditional guilty plea, and appealed.

ISSUE: May a person be detained (by being placed in a cruiser) prior to the officer having reasonable suspicion?

HOLDING: No

DISCUSSION: Bonilla argued that "Bemis did not have probable cause to effectuate the traffic stop." The Court stated that "probable cause is satisfied when the facts and circumstances within the officer's knowledge, based on reasonably trustworthy information, are sufficient to warrant a man of reasonable caution to believe that an offense has been or is being committed."[146] In this case, Bemis had articulated a valid reason for the stop and his testimony was credible.

Bonilla also argued that "Bemis lacked the reasonable suspicion of criminal activity required to detain him based on suspicions of illegal drug activity."

The Court noted that:

> Here, we know the scope of the traffic stop was exceeded at some point because the stop culminated in the arrest of Bonilla for transporting drugs in his vehicle. Thus, we must determine the point at which the original purpose of the traffic stop - writing the traffic citation - ceased and the detainment of Bonilla and his passenger began. Once the scope and duration of the stop is determined, we then focus on whether Bemis had a reasonable and articulate suspicion that criminal activity was afoot at the time of Bonilla's detention.

The Court agreed that "requesting a driver's license, registration, rental papers, running a computer check thereon, and issuing a citation do not exceed the scope of a traffic stop for a speeding violation."[147] Further, having the driver get out is also permitted.[148] "Moreover, 'the use of a well-trained narcotics-detection dog' during a traffic stop does not, in itself, infringe any constitutionally protected privacy interests."[149] Once the dog hit on the vehicle, "Bemis had the reasonable suspicion necessary to seize Bonilla and search his vehicle."

The Court looked to two recent cases to determine "when the purpose of a traffic stop turns into a detainment." In Torres-Ramos, the court stated that when the driver was placed in the back of the patrol car, he was

[146] U.S. v. Davis, 430 F.3d 345 (6th Cir. 2005); U.S. v. Bradshaw, 102 F.3d 204 (6th Cir. 1996).
[147] U.S. v. Hill, 195 F.3d 258 (6th Cir. 1999); U.S. v. Diaz, 25 F.3d 392 (6th Cir. 1994).
[148] Arizona v. Johnson, 129 S.Ct. 781 (2009); Pennsylvania v. Mimms, 434 U.S. 106 (1977).
[149] Illinois v. Caballes, 543 U.S. 405 (2005).

detained, since a usual traffic stop does not require that action.[150] In U.S. v. Blair, once the officer had all the information necessary and yet returned to the subject's car two minutes later and told Blair a dog would be called to the scene, the Court had "held that the remainder of the stop required reasonable suspicion and was in violation of the Fourth Amendment."[151]

The Court concluded that once Bemis placed the two in separate cruisers, the purpose of the original stop was over. "At this point, the officer's actions ceased being reasonable related in scope to the initial stop, and any concerns of the original traffic stop were overshadowed by the officer's suspicions of the contents of the vehicle." For that, he would require reasonable suspicion - "at the moment he stopped writing the ticket for the traffic violation and began pursuit of the drug investigation."[152] The Court reviewed the information provided to Bemis, both as individual elements and collectively. Individually, the evidence was very weak. Collectively, also, the case lacked "any strong indicators of criminal conduct other than minor actions by Bonilla that are generally present when a driver is pulled over." The Court stated that since "no reasonable suspicion was present at the inception of the detention on suspicion of transporting drugs, the detention was an unlawful seizure." The Court discounted the short period of time Bonilla was detained before the drugs were found, finding it irrelevant "since Bemis lacked reasonable suspicion to do so" at all.

Bonilla's plea was reversed and the case remanded.

U.S. v. Carr, 2009 WL 4795861 (6th Cir. 2009)

FACTS: On August 29, 2006 Madison County (TN) officer approached a vehicle (Tahoe) in a car wash bay. The plainclothes officers "parked their unmarked Ford Explorer facing the Tahoe, flashed the emergency lights on their vehicle, and then got out of their vehicle and advanced toward the Tahoe on foot." They arrested Carr (alone in the vehicle) and did a warrantless search of the vehicle, finding over $11,000 in cash, crack cocaine, marijuana, hydrocodone and a loaded handgun. They found a further $7,800 in cash on his person.

Carr was indicted and moved for suppression. Lt. Carneal testified at the hearing that Carr's "vehicle attracted his attention and raised suspicions in his mind because: (1) it was parked in a car wash bay at night, and no one was washing it; (2) the car wash was located in a high-crime area; and (3) the car wash itself was known as a meeting place for drug dealers. The Court denied the suppression. Carr took a conditional guilty plea, and appealed.

ISSUE: Must a vehicle stop and detention be supported by reasonable suspicion?

HOLDING: Yes

DISCUSSION: The Court reviewed case law on the issue and found that it was "clear that there are two relevant questions in this case, both fact-dependent and neither decided with sufficient clarity by the district court. The first is whether the initial contact between the police and the defendant was a Terry stop or a consensual encounter." In this case, it would depend upon whether the police had blocked in Carr's vehicle, and Lt. Carneal had stated they did not. Another factor is the use of emergency lights and whether they were used simply to identify themselves. The testimony indicated that they simply turned them on and off once.

[150] U.S. v. Torres-Ramos, 536 F.3d 542 (6th Cir. 2008).
[151] 524 F.3d 740 (6th Cir. 2008).
[152] U.S. v. Garrido, 467 F.3d 971 (6th Cir. 2006).

However, the Court noted, there was some question as to "whether the stop was supported by reasonable suspicion." The facts in this case were unclear on this matter, as well, and the Court reversed the decision and remanded it back to the trial court for further proceedings, to clarify the issues at hand.

SEARCH & SEIZURE – KNOCK AND ANNOUNCE

U.S. v. Roberge, 565 F.3d 1005 (6th Cir. 2009)

FACTS: Det. Brumley got a warrant for Roberge's home after his daughter "told him that Roberge 'cooks' methamphetamine in their basement." The judge waived the usual knock and announce requirement, upon proof that Roberge had firearms and had been "mentally unstable." He was charged with manufacturing and possessing firearms while involved in drug trafficking. In serving the warrant, officers found Roberge asleep in his bed with a loaded assault rifle nearby. They found numerous items connected to methamphetamine manufacturing. The daughter, who was apparently young, gave a detailed description at trial of what she had observed in the house.

Roberge requested suppression and was denied. Following his conviction, he appealed.

ISSUE: Is suppression the remedy for a violation of knock-and-announce?

HOLDING: No

DISCUSSION: Roberge argued that the affidavit contained materially false information that supported the waiver of the knock and announce requirement. However, the Court noted, as ruled in Hudson v. Michigan, "suppression is not a remedy for violation of the knock-and-announce rule."[153] T

After ruling on a number of other issues, the Court upheld Roberge's conviction.

SEARCH & SEIZURE - USE OF KEYS

U.S. v. Stewart, 2009 WL 530116 (6th Cir. 2009)

FACTS: Stewart was stopped (on foot) by Officer Jones (Metro Nashville PD) because of suspicious behavior. He provided his name and OL, and Jones found no outstanding warrants. Although some of the information Stewart provided was inconsistent, Jones allowed him to "move away." Officer Jones then contacted other officers for aid, and they searched the area where Stewart was observed in suspicious behavior. They found a baggie that contained crack cocaine, and evidence indicated it hadn't been there long. Officer Jones found Stewart, arrested him and searched him, finding a set of keys. Stewart denied the keys were his and said "that he did not know to whom they belonged." Another officer went in search of a vehicle that matched the keys and found a white Impala. The key unlocked the trunk, but the officer did not open it. He confirmed the keys also worked on the door, but again, did not open it.

Residents where the car was parked denied ownership of the vehicle. Officers congregated there and a drug dog was brought to the car. The dog alerted to the car and a search uncovered powder cocaine, marijuana and a loaded weapon, along with other information pointing to Stewart. After being given Miranda and being told what was found in the car, Stewart admitted everything was his.

[153] 547 U.S. 586 (2006).

Stewart was indicted and eventually took a conditional guilty plea. He then appealed.

ISSUE: May officers check to see if a set of keys in the possession of a suspect fit a particular car?

HOLDING: Yes

DISCUSSION: The Court found, first, that there was probable cause to arrest Stewart, based upon the evidence available to the officers at the time. Stewart also argued that the officers lacked cause to "seize his keys and use them to unlock the Impala." The Court found the search of his person, which revealed the keys, to be valid. His denial of any knowledge of the keys further justified their seizure, as that suggested that he was lying and that the vehicle associated with the keys might contain contraband.

With respect to the officer's use of the keys, the Court noted:

> "[t]he mere insertion of a key into a lock, by an officer who lawfully possesses the key and is in a location where he has a right to be, to determine whether the key operates the lock, is not a search."[154]

The officers, properly, did not actually search the car until the drug dog made a positive alert, which then gave them probable cause to search the entire car. Finally, Stewart's "incriminating statements were made after he was advised of his Miranda rights."

Stewart's conditional guilty plea was affirmed.

SEARCH & SEIZURE – PRETEXT STOPS

U.S. v. Wickersham, 2009 WL 2610816 (6th Cir. 2009)

FACTS: On January 30, 2007, Trooper Johnson (Ohio State Highway Patrol) received a tip about a pending drug transaction from an informant. The informant gave specific information concerning Wickerham's vehicle. Trooper Johnson and Snoopy, his drug K-9, went to a place along the route and waited. However, when Wickersham passed, the trooper was occupied with another stop and he asked Trooper Jordan to "see if he could get the vehicle stopped." "Jordan caught up with Wickersham and radioed Johnson asking whether there was already probable cause to stop the car. After receiving no answer from Johnson, Jordan told himself, "okay … if you're not going to answer me, I'm not going to just stop this car. I'll find a reason to stop it."[155]

When Jordan saw Wickersham cross the center line twice, he made a traffic stop. Wickersham claimed to have been watching Jordan, who had a white Pontiac pulled over, and he "figured [Jordan was] looking for white Pontiacs." Trooper Johnson and Snoopy arrived; the dog alerted on the trunk. "Johnson took Wickersham and a passenger, Elizabeth Saber, out of the car, patted them down, advised them of their Miranda rights and locked them in the back of Jordan's cruiser." Johnson found a flashlight and a locked suitcase in the trunk, and a small, home-made, compartment in the engine compartment. He could not open the compartment, either. Saber said "she and Wickersham had been out to dinner, but she could not remember in what restaurant or in which city." The vehicle and the pair were taking to the station, and the

[154] U.S. v. Salgado, 250 F.3d 438 (6th Cir. 2001).
[155] There is no indication in the record as to how this comment was captured.

vehicle more thoroughly searched. The officers found crack and powder cocaine hidden in the flashlight. Wickersham was arrested and indicted for trafficking.

Wickersham moved to suppress the evidence "as the fruit of an unlawful stop and search." The trial court denied the motion. Wickersham took a conditional guilty plea and appealed.

ISSUE: May officers make pretextual stops?

HOLDING: Yes

DISCUSSION: Wickersham argued that "he never crossed the lane line" and that the trooper "made up the story as a pretext for pulling him over." The trooper "shut off his camera shortly before seeing the violations, which made it harder to challenge his testimony, and that the odds are slim that, within one minute of pulling up behind Wickersham, Jordan would catch him violating the law." The Court, however, noted that just because there was "a potential motive to fabricate does not make Trooper Jordan's testimony a fabrication." The trial court had found Jordan credible. The Court agreed that "[n]o doubt, Jordan would have been well advised to keep his video camera on during the whole pursuit." However, he was in compliance with state law and agency policy, even though he failed to record the actual violations.

The Court also discounted Wickersham's assertion that Jordan's action, coming up fast behind him, caused him to swerve. Finally, the Court discounted the assertion that Snoopy only signaled because she was directed to do so, noting that the video does not support that theory. The Court noted that "adding weight to the probable cause determination is the tip Trooper Johnson received from the confidential informant." The Court further upheld the logic of taking the car to a warm, lighted location to search, since the night was cold and windy and it was dark at the location of the actual stop. Trooper Johnson had also "discovered some suspicious modifications in the front of the car, and witnessed Saber's suspicious inability to remember their supposed dinner destination."

The Court affirmed the plea.

SEARCH & SEIZURE – PLAIN VIEW

U.S. v. Estes, 2009 WL 2568097 (6th Cir. 2009)

FACTS: On June 7, 2007, Crowder contacted the Jackson, TN, PD to report that she had been assaulted at Estes's home. She told Officer Anderson that she went there to get high, but that Estes "attempted to rape her" and that she'd kicked out the window to escape. Crowder and Anderson went to Estes's home, with other officers. Crowder pointed out her car, which she'd left in the driveway in her hurry to escape. Anderson saw a broken window, as well. He knocked. Estes answered and reported that his son had argued with his girlfriend and the window had gotten broken, before they left. Crowder, however, identified Estes as her assailant.

Anderson arrested Estes and secured him in the patrol car. The officers did a "protective sweep" of the residence; one noted a "little Derringer" on a nightstand. Crowder also went inside in search of her keys and cell phone, which she claimed Estes had taken, but they were later found in her car. Although the testimony was confusing, Officers Anderson and Falacho "entered the yard of the house to look around." Falacho took photos, and he noticed a tray, which was found to contain drug-related items, "on the ground behind a wheel of

the defendant's car, which was parked in the driveway and visible from the alley." Det. Stilwell arrived and prepared an affidavit for a search warrant, which stated:

> *When JPD officers arrived on the scene to make contact and detain Estes, officers observed in plain view a small Derringer type handgun in Estes' bedroom during a security check [of] the residence after Estes stated that his son had been at the residence. Officers also found marijuana, cocaine packaged in multiple separate baggies, oxycontin, drug paraphernalia and a State of Tennessee cosmetology license issued to James Estes with the illegal drugs that was [sic] concealed outside the residence under Mr. Estes' vehicle. Mr. Estes, by his own voluntary admission served a 12 year sentence for drug crimes and was released in 2000.*

The warrant was signed and executed. During the search the officers seized the Derringer, as well as other guns, marijuana and prescription medication.

Estes moved for suppression. At the hearing, the trial court concluded that there was insufficient evidence to "justify a conclusion that the officers thought someone else was in the house." As such, they "could not rely on the 'public safety' exception to the warrant requirement for their protective sweep" or the community caretaker exception. However, the Court denied the motion, finding that even if the reference to the gun (which was sighted in the house) was eliminated from the affidavit, the officers still had sufficient probable cause because the items outside were also in plain view. Estes took a conditional guilty plea and appealed.

ISSUE: May the physical location of a suspect item suggest its incriminating nature?

HOLDING: Yes

DISCUSSION: Estes argued that the "officers could only have observed the tray containing drug-related items by violating the 'curtilage' of his property." The Court agreed that the Fourth Amendment extended its protections to the curtilage.[156] He noted that his backyard was surrounded by a fence. The Court agreed that "it is an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed."[157] It is critical, also, that the "incriminating character of the evidence must be immediately apparent and the officer must have a lawful 'right of access' to it."

In this case, the officer simply stated that he saw a tray, in an unusual location. However, the Court noted that at least three of the Dunn factors were not present and that indicated the driveway did not constitute a curtilage. First, the "area was not enclosed," the "defendant had not taken any steps 'to protect the area from observation by people passing by,'" and "it was used as a point of entry into the residence, accessible from the adjacent alley." The Court noted that "while the testimony of Officer Falacho is equivocal concerning precisely when he saw the tray, he stated unequivocally that it was in plain view." Further, the Court noted that "while a tray in the abstract may not be 'inherently incriminating,' a tray placed behind the wheel of a car at a residence where officers had been told that drug trafficking occurred earlier in the evening is inherently worthy of a closer look." One of the officers had stated that the witness told them Estes used a tray. In U.S. v. McLevain, the Court had found that an "item is inherently incriminating" when "the executing officers can *at the time* of discovery of the object on the facts then available to them determine probable cause of the object's incriminating nature."[158]

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[156] U.S. v. Jenkins, 124 F.3d 768 (6th Cir. 1997); U.S. v. Dunn, 480 U.S. 294 (1987).
[157] Horton v. California, 496 U.S. 128 (1990).
[158] 310 F.3d 434 (6th Cir. 2002).

Estes' plea was affirmed.

SEARCH & SEIZURE - K-9

U.S. v. Scott, 2009 WL 2251306 (6th Cir. 2009)

FACTS: On November, 29, 2007, Officer Jared (Lexington PD) saw a "blue Dodge sedan matching the description of a vehicle implicated in a narcotics investigation." The vehicle was speeding and "made an illegal turn." He make a traffic stop and did a "warrants check." A K-9 unit arrived, and the officer had Scott get out allowing the dog to work. The dog alerted. The officers found crack and powder cocaine, along with marijuana.

Scott was indicted for possession with the intent to distribute. He moved for suppression, and was denied. Scott took a conditional guilty plea and appealed.

ISSUE: Does an officer need probable cause to allow a dog sniff of a vehicle otherwise legitimately stopped?

HOLDING: Yes

DISCUSSION: Scott first argued that "Jared lacked probable cause to conduct a warrantless traffic stop." The Court noted that Kentucky case law "has specifically held, that excessive speed or driving erratically constitutes reckless driving…." Scott was driving at "nearly double the speed limit, and made an improper turn signal." That gave the officer probable cause for the stop. Scott then argued that the officer had no right to allow the dog to sniff his vehicle, but the Court noted that the "canine team arrived before Jared even began to run the warrants check" and as such, he was not detained for that purpose.

The Court upheld his plea.

SEARCH & SEIZURE - EXIGENT ENTRY

U.S. v. Washington, 573 F.3d 279 (6th Cir. 2009)

FACTS: Washington lived with his uncle, Young, in Cincinnati. On December 18, 2006, Officer Rock recognized Young as someone who had dropped a crack pipe previously, so he arrested him. "As Officer Rock was ushering Young into a police car, Young shouted up to Washington, who was watching from the window of the apartment, instructing him to secure the apartment and keep people out."

A few days later, the landlord, Moore, told the officer that "he had observed a number of non-residents loitering in the halls." Moore stated, specifically, that he had been told there was a "great deal of foot traffic" in the Young apartment and that a man had entered with a gun. He told the officer that in light of Young's arrest, no one was permitted to be in the apartment. Rock took no immediate action but continued patrolling. Several days later, Officer Rock saw two women arguing near the building. One of the women (Wilson) said she was Young's girlfriend and that she was looking after the apartment. She told the officer there were two people in the unit, but "did not request his help or say they were trespassing." The officer, however, assumed that they were. Wilson gave him consent to search, but Rock later "testified that he did not believe Wilson had authority

to consent to the search." (He admitted he got her consent to "cover all his bases.") An unknown person answered the knock and opened the door. "Washington was among those who were immediately visible, and he became belligerent and told Rock that he was not allowed in the apartment." Once Rock entered, he immediately saw drug paraphernalia, but nothing indicated it could be seen from the doorway. Washington initially said the officer could not search him, but when told he would be frisked, he admitted to having a weapon. A crack pipe was also found.

Washington was a convicted felon, so he was charged. Upon motion, however, the trial court suppressed the evidence, finding that he "had an expectation of privacy in the unit and the search violated the Fourth Amendment." In response, the government argued that probable cause and exigent circumstances justified the warrantless entry and search. When denied, the government appealed.

ISSUE: Does a minor criminal justify sufficient to justify an exigent entry?

HOLDING: No

DISCUSSION: The Sixth Circuit has, in the past, "generously construed the Fourth Amendment as protecting nearly all overnight guests, even when the guest occupies a common area in the apartment that is not private from other residents."[159] Washington had been lawfully residing in the apartment for several months, but the government argued that since Young's lease prohibited multiple occupants (and using the apartment for illegal purposes) that Washington was a trespasser. Even though Young was, in fact, delinquent on his rent, the Court found Young was still a lawful resident and thus could invite others to lawfully be in his apartment. The Court noted that simply being behind on the rent, or having someone else live on the premises, was not sufficient to divest a tenant of an expectation of privacy. The Court moved on the discussion of a possible exigency - which it framed as "Officer Rock's belief that an ongoing criminal trespass was taking place." The Court reviewed the possibilities for raising that exigency exception and found that none applied. The Court stated, specifically, that "an ongoing criminal trespass, on its own," does not create an exigency, as nothing Washington was doing was immediately dangerous. The Court noted that, in Welsh v. Wisconsin, it had been held that "an important factor to be considered when determining whether an exigency exists is the gravity of the underlying offense for which the arrest [or search] is being made."[160] In this case, the offense was a minor misdemeanor.

The Court upheld the suppression of the evidence.

SEARCH & SEIZURE – GANT

U.S. v. Bell, 2009 WL 2526161 (6th Cir. 2009)

FACTS: Bell was arrested after a CI made a call to his "drug source." After the transaction, Bell left and was stopped by the police. After drugs were found, and he was charged, he took a conditional plea. He then appealed.

ISSUE: May officers search a vehicle incident to arrest if they can reasonably believe that evidence of the offense is in the car?

HOLDING: Yes

[159] U.S. v. Pollard, 215 F.3d (6th Cir.)
[160] 466 U.S. 740 (1984)

DISCUSSION: Bell argued that the police search of his car violated Arizona v. Gant.[161] The Court agreed, however, that the "police could reasonably believe that evidence of Bell's drug offense was in the car," since he "had apparently sold the drugs inside the car, and had driven the car to and from the sale site."

Bell's plea was upheld.

SEARCH & SEIZURE – FEDERAL AUTHORITY

U.S. v. Evans, 581 F.3d 333 (6th Cir. 2009)

FACTS: On February 13, 2006, Cartwright and Pasha were in the Social Security building in Detroit. Pasha was using her cell phone and was asked by a guard to end her call because such use was prohibited in the building. He waited a few minutes but she continued to talk. When he asked her a second time, she put her phone on speaker so that everyone could hear the call. The guard (Cleveland) left the lobby and contacted the Federal Protective Services (FPS) for help. When he came back to the lobby, Pasha "had got into it with somebody else…."

FPS officers Smith and King responded to the call of a disturbance. Cleveland directed them to the two women and the officers escorted them outside and told them to leave. The FPS officers later stated they were "very disorderly," were "loud and belligerent" and cursing. Cleveland came outside to check on the situation and observed one of the women dancing to music coming from her cell phone. The two FPS officers later stated that they took no further official action at the time because they were young girls just trying to show off, and they knew someone was coming to pick them up.

Evans arrived to pick up the girls. She almost struck one car and blocked in the driveway. The girls got into the car but Evans got out and walked into the SSA building. She made "vociferous statements" that Officer Smith took as threats against the guard for making Pasha stop talking on the phone. Smith made a note of her license plate as she drove away and ran it through dispatch. Officers Smith and King followed Evans, while waiting for the response from dispatch. They received a negative report and at that point, they passed Evans's car and "basically considered the incident 'over.'" Evans, however, then fell in behind them and began to tailgate them, and "the women inside the car were reaching underneath their seats and making visible hand gestures in the direction of the FPS vehicle, their thumbs and index fingers raised, ' as if they were pointing a gun.'" Both men took the gesture as a threat. They made a vehicle stop. Evans "made various obscene remarks and refused to lower her car window or produce her driver's license or registration." She stated that she would not comply because they were not "real" police.

Officer King called Detroit PD for assistance and officers promptly arrived. They assured Evans that the two men were federal law enforcement officers. When they ran her license and vehicle information, they learned that she had an outstanding warrant. The FPS officers arrested her. On the way to booking, they also learned there was an unserved personal protection order and they asked Evans about it. She indicated (profanely) that she was going to kill the individual (another police officer) who took out the order, and that she would do the same to Smith and her mother. After being processed for federal crimes, concerning the threats, Evans was turned over to Detroit PD.

[161] Supra.

Evans was charged with threatening to assault a federal law enforcement officer and related charges. The federal court ultimately convicted her for the threat, but acquitted her for failing to comply with the FPS officers' orders because their "ticket" was "limited to federal property." Evans appealed.

ISSUE: May federal officers make a vehicle stop for investigation of a federal offense?

HOLDING: Yes

DISCUSSION: The Court reviewed the legal mandate of the Federal Protective Service and quickly concluded that they "reasonably exercised their investigative and protective authority pursuant to [federal law] when they left federal property to surveil Evans's vehicle." Since their authority extended to the protection of persons on federal property, it was appropriate for them to follow her because of her threats toward the security guard. When they received a negative report from dispatch, the considered it over and abandoned their investigation. The Court found the stop appropriate as well, as they had probable cause to arrest her at the time of the assault for threatening to assault them. The Court noted that it was immaterial that they were not on federal property at the time. Finally, the Court ruled that Evans' response to Smith's question about the order was not as a result of interrogation, but was, instead "spontaneously volunteered and unresponsive to his question."

The Court affirmed the decision of the trial court.

SEARCH & SEIZURE - COMPUTER

U.S. v. Lapsins, 570 F.3d 758 (6th Cir. 2009)

FACTS: Lapsins was suspected of involvement in child pornography, through his computer interaction with another suspect in the same offense. The investigator located a photo that had been exchanged and matched the photo to a known victim with the National Center for Missing and Exploited Children. Using a court order, he requested subscriber and billing information for the email account in question. AOL did so, also providing all other email accounts listed with that account, as well as the same telephone number provided to the suspect in the other case. The investigator also discovered that the Yahoo account that matched what he had listed Lapsin's email address as an alternate eddress. The investigator also requested and received "CyberTipline Reports" concerning that same email/Yahoo screen name. He received one tip and matched the information and IP address to Lapsins' listed home address. He also confirmed that the IP address was connected to a cable modem. The investigator, Klain, got a search warrant. The police seized a computer, computer equipment and numerous CDs and other storage media. About 1400 images of child pornography and about 69 videos were seized. Lapsins admitted to sending images to the other suspect and creating a Yahoo! group to share child pornography.

Lapsins was indicted and requested suppression. When that was denied, he took a conditional guilty plea, and appealed.

ISSUE: Is it necessary to connect computer activity to a physical location for a search warrant?

HOLDING: Yes

DISCUSSION: Lapsins argued that the warrant did not satisfy probable cause and that the investigator's supporting affidavit did not provide reason to believe that the pornographic images at issues were photographs

of real children, as opposed to computer-generated images, or that the evidence related to the suspected crime would be located at Lapsin's house. He also argued that the information "was stale because one of the major events described in the affidavit, the Yahoo! chat and emailing the image to the Greensburg Suspect, occurred nine months before the warrant was issued."

The Court found that his first argument failed because the totality of the circumstances "provided probable cause to believe that the pornographic images at issue included images of real children." Specifically, the image emailed by Lapsins was a "known victim" who had been identified for the National Center for Missing and Exploited Children by an identified Belgian police officer. The NCMEC had told the officer that it was a photograph of a real child, and it could be assumed, as such that the image was not a virtual, computer generated image. Jones reasonably believed, as did the magistrate judge, that the image "likely depicted a real child." Further, Yahoo! reported to the investigator that "Lapsins uploaded 132 images of child pornography" to the site on a specific date. The opinion found it sufficient, but noted that the "better practice would be to include a plain statement of the affiant's belief that the image depicted a real child, together with a recitation of the facts that support such belief." The Court noted that Lapsins had put forth no information that would have suggested "that the images were not of real children." As such, at the probable cause stage needed for a warrant, the Court found it reasonable to believe at least some of the images depicted real children.

With respect to his second argument, the Court noted that there was ample evidence to connect Lapsins to both the computer identifiers and to the address on the search warrant, his residence. At least some of the uploads came through a "residential cable modem in the Cincinnati area." Further, such criminal activity would be "much more tied to a place of privacy, seclusion, and high-speed Internet connectivity…." It is a "matter of plain common sense" that if such matter involves a home email address, it would be likely to find evidence on a home computer.

As for the staleness issue, the Court noted that the old information had been "freshened" by new information that was sufficient to remedy any "potential staleness defect." The Court also noted that "pornographic images can often be recovered from computers by forensic examiners such that the passage of time does not greatly affect the probable cause calculus."

After a lengthy discussion on sentencing issues, the Court affirmed Lapsins' conviction and sentencing.

COMPUTER CRIME

U.S. v. Lay, 583 F.3d 436 (6th Cir. 2009)

FACTS: Lay was accused of inducing a 15-year-old girl to engage in sexual conduct. He had made arrangements to travel to Ohio (where she lived) and had booked a hotel room and laid out explicit plans for the encounter. Most of the communication occurred via cell phone, but some had occurred initially via a computer exchange. Lay was arrested when he arrived in Ohio for his liaison, after her mother had discovered the plot and had given consent to the police to record the later calls.

Lay took a guilty plea, but argued that several of the sentencing enhancements were inappropriate.

ISSUE: Does a meeting that takes place via a computer subject the defendant to charges relating to the computer?

HOLDING: Yes

DISCUSSION: Lay argued that "none of the conversations relating to the trip to Ohio occurred on a computer." He had, however, booked his flights and hotel online, and had apparently scanned photos, despite his claim that he didn't know much about computers. Further, the evidence indicated that they had initially met "though the use of a computer." The Court noted that "enticement does not require crude specification of intent." The computer communication only ceased after Lay began plying the victim with gifts, "including the phone that replaced the computer as a means of communication."

Lay's sentence was upheld.

U.S. v. Frechette, 583 F.3d 374 (6th Cir. 2009)

FACTS: On Nov. 26, 2007, ICE agents learned that Frechette had paid $80 for a one-month-subscription to a site that provided child pornography in January of the same year. (The agents had viewed the "splash" page that welcomed visitors to buy a membership.) Frechette used a PayPal account which was funded by his debit card and that account was only used once for this purpose. Further, the agents noted the IP address was registered to his home address, which he shared with his mother. In his warrant, the agent "stated that based on his experience, evidence of the storage of child pornography is often present on the computer hard drives of consumers of child pornography - sometimes in multiple locations on the hard drive, some of which they may not even be aware of." Also in the warrant was a notation that Frechette was on the Michigan sex offender registry at that address, and the "probation office, the postal service, and the department of motor vehicles" also confirmed that to be his address.

The agent requested and obtained a search warrant, and child pornographic images were found on his computer on April 8, 2008. He confessed and was indicted. He then moved for suppression, and the trial court suppressed the evidence, finding that the information on the subscription was stale and further, that the affidavit lacked a "link between the factual basis and the conclusion that there was a fair probability that evidence of a crime would be found at the defendant's home or on the computer." The Government appealed.

ISSUE: Is stale information in an affidavit as critical in a child pornography case?

HOLDING: No

DISCUSSION: The Court noted, initially, that "stale information cannot be used in a probable cause determination."[162] In the drug trade, the Court agreed, information that is 16 months old is usually considered stale - because drugs are usually sold and consumed in a prompt fashion." However, "with respect to images of child pornography, however, the answer may be no because the images can have an infinite life span."

> In analyzing whether information is stale, this court considers the following factors:
> (1) the character of the crime (chance encounter in the night or regenerating conspiracy?),
> (2) the criminal (nomadic or entrenched?),
> (3) the thing to be seized (perishable and easily transferrable or of enduring utility to its holder?), and
> (4) the place to be searched (mere criminal forum of convenience or secure operational base?).[163]

[162] U.S. v. Spikes, 158 F.3d 913 (6th Cir. 1998).
[163] U.S. v. Abboud, 438 F.3d 553 (6th Cir. 2006).

Applying the facts to the case at had, the Court concluded:

> 1. Character of the Crime. As we have explained on multiple occasions, child pornography is not a fleeting crime. And "because the crime [of child pornography] is generally carried out in the secrecy of the home and over a long period, the same time limitations that have been applied to more fleeting crimes do not control the staleness inquiry for child pornography."[164] Indeed, in U.S. v. Frechette, the search warrant approved was based on an affidavit that included evidence of the defendant's subscription to a child pornography web site that was purchased thirteen months before the actual search.[165] Moreover, here the agent stated that in his experience evidence of child pornography downloading often remains on a computer for lengthy periods of time.[166]
> 2. The Criminal. The affidavit clearly established that the defendant was not nomadic. Indeed, all of the evidence indicated the defendant lived in the same house for the entire sixteen months in question.
> 3. The Thing to be Seized. Unlike cases involving narcotics that are bought, sold, or used, digital images of child pornography can be easily duplicated and kept indefinitely even if they are sold or traded. In short, images of child pornography can U.S. v. Frechette have an infinite life span.[167] ("Images typically persist in some form on a computer hard drive even after the images have been deleted and, as ICE stated in its affidavit, such evidence can often be recovered by forensic examiners."[168]
> 4. The Place to be Searched. The place to be searched in this case was the defendant's residence, which is clearly a "secure operational base."[169] (holding that the crime of possession of child pornography "is generally carried out in the secrecy of the home and over a long period."[170])

The Court agreed that all of the Abboud factors indicated that the evidence was not stale. However, that did not end the analysis, because the court then had to determine whether the magistrate judge "had a substantial basis to conclude that probable cause existed."[171] The Court agreed that the facts indicated "that there was a fair probability that evidence regarding illegal images of child pornography could be found on a computer located at" Frechette's home address. Specifically, the Court agreed that someone who paid for a subscription would use it and "to hold otherwise would defy logic."

The Court reversed the suppression of the evidence.

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[164] U.S. v. Paull, 551 F.3d 516, 522 (6th Cir. 2009) (citing U.S. v. Wagers, 452 F.3d 534, 540 (6th Cir. 2006)).
[165] Id. at 522-23 (citing U.S. v. Lacy, 119 F.3d 742, 746 (9th Cir. 1997) (upholding search for child pornography based on evidence that the defendant subscribed to a similar web site ten months prior to the search)).
[166] See U.S. v. Williams, 544 F.3d 683, 686 (6th Cir. 2008) (holding that courts may give "considerable weight to the conclusion of experienced law enforcement officers regarding where evidence of a crime is likely to be found" (citing U.S. v. Bethal, 245 F. App'x 460, 465 (6th Cir. 2007))); see also Wagers, 452 F.3d at 540 ("[E]vidence that a person has visited or subscribed to web sites containing child pornography supports the conclusion that he has likely downloaded, kept, and otherwise possessed the material." (citing U.S. v. Martin, 426 F.3d 68, 77 (2d Cir. 2005); U.S. v. Froman, 355 F.3d 882, 890-91 (5th Cir. 2004))).
[167] See U.S. v. Terry, 522 F.3d 645, 650 n.2 (6th Cir. 2008)
[168] Lacy, supra.
[169] Paull, supra.
[170] Wagers, supra.
[171] U.S. v. Gardiner, 463 F.3d 445 (6th Cir. 2006.)

42 U.S.C. §1983 - SELECTIVE ENFORCEMENT

Wiley v. Oberlin Police Department, 2009 WL 1391532 (6th Cir. 2009)

FACTS. In August, 2003, Howard had a heart attack. His "ex-fiancee," Wiley, had possession of his car, wallet, credit cards and bank book and had possessions in his house at the time. Another woman, Hougland called his "ex-live-in-girlfriend," told Walsh, the Oberlin City prosecutor, that "she wanted Howard's things and wanted Wiley out of his house." "She persuaded Walsh to cause Wiley's arrest so that she could lock her out of Howard's house."

Wiley alleged that "Walsh instructed the Oberlin (OH) Police Department to arrest her for driving under a suspended license." "Hougland and Howard's children used this opportunity to lock Wiley out of Howard's house, without a legal eviction proceeding, and [stole] her belongings." The officers took the car she was driving, and some of her belongings, and she never got them back. She also claimed the OPD "failed to properly investigate her claim of stolen property." Wiley also claimed that several other prosecutions were initiated, but the record included conflicting information as to the resolution of the charges in those cases.

Wiley filed suit against various defendants, including members of the police department, the prosecutor and the city, under 42 U.S.C. §1983. The trial court eventually dismissed all charges, and she appealed.

ISSUE: Does a selective enforcement action require the subject be part of a protected group?

HOLDING: Yes

DISCUSSION: The Court broke apart the various claims and addressed each in turn. First, the Court agreed that the City (and the officers involved) had probable cause to stop her for the suspended license, since one of the officers knew that was the case. (He also verified the suspension through their computer records system before the stop.) The Court noted that any other motivations for the stop were irrelevant.[172]

With respect to an earlier charge, the Court agreed that the officers also had probable cause to have arrested Wiley for a domestic assault against Howard, although that case was eventually dismissed, apparently because Howard did not appear. The Court also agreed her arrest for a protective order was valid. As such, the prosecutor had probable cause to pursue a criminal action against Wiley, The Court looked at the assertion of selective enforcement, in which the state actor must initiate prosecution against a person belonging to a protected, identifiable group, must have a discriminatory purpose and which did have a discriminatory effect. They do so by showing that similarly situated persons were not prosecuted. Since Wiley asserted that she was targeted because of her personal relationships, they court found no constitutional violation

With respect to the City of Oberlin, because Wiley could not prove a case against any individual defendants, the case against the city failed. With respect to the allegedly stolen items, both against Houghland and the police, the Court ruled that Ohio law must be applied, rather than federal law.

The Court upheld the dismissal of the federal claims, and remanded the state claims back to Ohio.

[172] Whren v. U.S., 517 U.S. 806 (1996).

42 U.S.C. §1983 - FALSE ARREST

Garner v. Grant, 2009 WL 1391521 (6th Cir. 2009)

FACTS: On the day in question, Karlie Garner (age 11 months) got out through an open sliding door at the family home. Her mother, Lisa, later claimed that she "zoned out" for about 10 minutes and discovered her gone. The child was found in the backyard pool and was eventually pronounced dead.

Det. Grant interviewed Lisa and Craig Garner at the hospital. Craig told the officer that he'd previously scolded Lisa about leaving the door cracked (which was done for the benefit of the cat), although that statement was later disputed. The "contested phrase" was included in the report the officer forwarded to the prosecutor. Eventually, Lisa Garner was charged with involuntary manslaughter and second-degree child abuse. The prosecutor later stated that "he would have been 'highly unlikely' to have recommended a warrant had Craig's statement not included the contested phrase." However, even after Craig testified and disputed the statement, the Michigan court found probable cause and bound Garner over for trial.

Garner was acquitted and filed suit against Grant. The trial court granted summary judgment to Grant, and Garner appealed.

ISSUE: Does a finding of probable cause negate a wrongful arrest claim?

HOLDING: Yes

DISCUSSION: Garner alleged that Grant caused her wrongful arrest, but the Court noted that the "existence of probable cause, therefore, negates an essential element of a § 1983 suit alleging "deprivation of constitutional rights under color of law."[173] Further, "[p]robable cause to justify an arrest means facts and circumstances . . . that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense."[174] The Court agreed with the trial court that even without the contested statement, Det. Grant had sufficient cause to support a charge of manslaughter against Garner. The Court also addressed the issue from a due process viewpoint, and concluded that Det. Grant's alleged actions did not "shock the conscience," nor were they likely to have affected the result of any criminal action against Garner.

The summary judgment was affirmed.

Brooks v. Rothe, 577 F.3d 701 (6th Cir. 2009)

FACTS: Brooks was a shift supervisor at a SafePlace facility for victims of domestic violence. The policy manual for the facility "stressed the importance of resident confidentiality" and emphasized that they should contact a higher-level supervisor if law enforcement wanted access and that all searches required a search warrant. On May 8, 2006, Brooks noted that a resident, MR, became increasing uncoordinated and had trouble walking and standing over the course of several hours. She asked if she needed medical help, which she declined, but "when she tried to stand up, she staggered and could not walk." Eventually, she agreed to medical treatment and he called 911. However, the first responder to arrive was Lt. Rothe (Bad Axe, MI, PD) Brooks refused to let him in or give him any information. Brooks later stated he was "uncomfortable giving Rothe any information because he was not with the ambulance." She was concerned that he might be a

[173] Sutkiewicz v. Monroe County Sheriff, 110 F.3d 352 (6th Cir. 1997)
[174] Michigan v. DeFillippo, 443 U.S. 31 (1979).

resident's husband and not a police officer. "Rothe, growing frustrated, explained to Brooks that he was a first responder and needed to come into the building," but when she continued to deny him, he left.

The ambulance arrived and the paramedics entered. Brooks called her supervisor again to get permission to copy MR's file for the paramedics. She also told him about refusing Rothe entry, and Kain told her that he was "fine" and could be admitted." Brooks later denied that she was told it was alright to admit him. Brooks then received a call from Weisenbach, a local prosecutor and SafePlace board member, who "demanded information about the events at the shelter and yelled at Brooks for not letting Rothe enter the building." During this time, the paramedics became suspicious that MR had overdosed on drugs, possibly Soma and Ativan. She was transported to the hospital. The resident's roommate reported to Brooks that she had seen MR take several pills and gave her an empty plastic bag that had contained the pills, which Brooks locked up. Brooks was concerned that there might be more drugs in the room, because a child shared MR's room.

Lt. Rothe had contacted Chief Bodis, as well as Weisenbach. Bodis also received a call from his wife, a 911 supervisor, and learned that the call was a drug overdose. Bodis contacted the chief prosecuting attorney, Gaertner, who instructed that the "SafePlace needed to be secured and investigated." Bodis called the SafePlace president to express his displeasure about Brooks' refusal to admit Rothe. He called Gaertner back to ask about getting a warrant, and was instructed that exigent circumstances (potential destruction of evidence and the safety of the residents) meant that a warrant was unnecessary. Weisenbach and Rothe proceeded to the SafePlace to gain entry, and again, they were denied entry. What occurred when they arrived was somewhat in dispute, with some assertions that Brooks physically denied Weisenbach entry. Rothe again contacted Bodis, who was also in contact with Gaertner, and all agreed that Brooks should be arrested. Brooks was arrested for resisting and obstructing a police officer. Later, the charges were dismissed at the volition of the prosecutor.

Brooks filed suit against all named parties above, as well as the City of Bad Axe, under 42 U.S.C. §1983, on a variety of assertions including assault and battery, false arrest and false imprisonment.

The trial court granted summary judgment to the defendant officers on the federal claims, and also dismissed the state claims without prejudice. Brooks appealed.

ISSUE: Is arrest appropriate when an officer is denied entry during an emergency situation?

HOLDING: Yes

DISCUSSION: The Court concluded that Brooks' claim "hinges on the legality of her arrest for resisting or obstructing Lieutenant [sic] Rothe" and as such, would be considered under the Fourth Amendment. The Court reviewed the matter under the elements of the original charge against Brooks and concluded that it was appropriate to charge her with the offense. Further, the Court agreed that the entry by Lt. Rothe was justified under exigent circumstances and Brooks was actively preventing him from making the entry.

The Court upheld the summary judgment.

Noy, Estes, Rhodes v. Travis, 339 Fed.Appx. 515, 2009 WL 2018762 (6th Cir. 2009)

FACTS: On June 10, 2001, Noy noticed a change in her 2-year old daughter's behavior. She took her to her doctor, who noted that he did not believe the child had been abused but could not "conclusively rule" it out. Several days later she took her to another doctor and then to an emergency room. The ER doctor told her too much time had passed for any physical evidence to be found. During that time frame, Noy and her

mother, Estes, made a videotape of the child's genitalia to document the suspected abuse. She did the same to her other daughter, who would have been an infant at the time of the suspected abuse. Prior to going to the ER, she took the tapes to the Pike County (Ohio) Sheriff's Office as she suspected the child had been sexually abused by her father, Rhodes. On Jun 15, 2001, Noy was interviewed by a deputy sheriff, and on June 27, Dep. Travis took out a criminal complaint against Noy and Estes charging them with endangering the child. Both were indicted about two months later, and promptly went to trial. Noy was acquitted at trial and the charges against Estes were dropped.

Noy and Estes filed suit against all parties, including a claim on behalf of the two children for being deprived of their mother and grandmother for a period of time. The trial court gave the defendants summary judgment and Noy and Estes appealed.

ISSUE: Does an acquittal in a criminal charge mean there was no probable cause?

HOLDING: No

DISCUSSION: First, the Court noted, the "right to be free from an arrest lacking in probable cause is clearly established."[175] However, "the mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest."[176] The Court agreed that the "graphic videotape of [Noy] examining her naked children," was enough to satisfy the standard of objective reasonableness for the arrest.

The summary judgment was affirmed.

42 U.S.C. §1983 - MEDICAL CARE

Harris v. City of Circleville, 583 F.3d 356 (6th Cir. 2009)

FACTS: On April 3, 2004, Trooper McManes (Ohio State Highway Patrol) stopped Harris for speeding. Harris's fiancée was following. McManes believed that Harris might be intoxicated, but after testing decided that she was not going to charge him with DUI. Harris sat in his fiancee's car while waiting for the ticket. Another trooper arrived, Cooper, and told Harris that he was going to be arrested for DUI, and further, that there was a warrant out for him. Harris later admitted to being upset and cursing. Trooper McManes handcuffed Harris and took him to the Circleville City Jail. There, Officers Williams, Roar and Gaines were on duty. They started the booking process and one of the officers yanked at Harris's neck chain. He was taken to the ground, lifted and walked backward into the booking area again. (Some of the events were caught on surveillance tape.) He was told by one officer to kneel, but he could not do so because he was handcuffed and one of the offices "was pulling his arms up behind him." The officers then "used a 'takedown' maneuver," with one officer striking him in the back of the knee and another apparently using a baton to the side of his leg. (The opinion noted that Harris did not appear to be resisting on the tape.) Harris later stated he heard popping sounds and started screaming that they broke his neck. He also told them to quit shocking him, but the officers told him he wasn't being shocked. He did not respond to their commands to get up and they eventually stripped him to his underwear and dragged him into the cell. He was still yelling that he could not move and was in pain. At some point, Trooper McManes stopped by the cell and read a form to him.

One of the civilian employees later testified that Harris's screams could be heard as far as the communication center. Finally, another officer checked on him, contacted the sergeant and EMS was called, over an hour

[175] Estate of Dietrich v. Burrows, 167 F3d 1007 (6th Cir. 1999).
[176] Michigan v. Defillippo, 443 U.S. 31 (1979).

after Harris was booked. Harris was discovered to have a spinal cord injury, aggravated by a congenital defect of his spine. Harris filed suit, alleged that the city and the officers used excessive force and were deliberately indifferent to his medical needs. The defendants requested summary judgment, which the trial court denied, finding first that the force could be found, by a jury, to be "not objectively reasonable," and further that at layperson would have realized Harris needed medical care. The judge did give summary judgment to the City of Circleville, however.

The officers filed an interlocutory appeal.

ISSUE: Is an officer expected to recognize and act upon a serious medical need of a prisoner?

HOLDING: Yes

DISCUSSION: First, with respect to the excessive force claim, the Court found that the officers were "not entitled to qualified immunity because [it] conclude[d] that the facts taken in a light most favorable to Harris are sufficient to establish a violation of Harris's constitutional rights under either standard."

The Court continued:

> Applying a Fourth Amendment analysis to Harris's excessive force claims, it is clear that the facts, taken in a light most favorable to Harris, are sufficient to establish a violation of his constitutional rights. The "objective reasonableness standard" depends on the facts and circumstances of each case viewed from the perspective of a reasonable officer on the scene.[177]). Relevant considerations in determining the reasonableness of force used are: 1) the severity of the crime at issue; 2) whether the suspect posed an immediate threat to the safety of the police officers or others; and 3) whether the suspect actively resisted arrest or attempted to evade arrest by flight.[178]
>
> In assessing the reasonableness of the Officers' actions, we analyze the events in segments. There are three segments: 1) the initial incident in Cell No. 3; 2) the takedown maneuver in the booking area; and 3) the kicking incident in Cell No. 3. Considering the relevant factors, with respect to each of these three segments, Harris's version of the events supports a holding that Defendants violated Harris's Fourth Amendment right to be free from excessive force.
>
> Under Harris's version of the facts, in the first segment, the Officers began the booking process by attempting to take Harris's jewelry and belt from him. When one of the Officers yanked at a necklace he was wearing using a ball point pen, Harris said, "Man, you don't even have to do that" and stepped back. The Officer then kicked Harris's leg out from under him and pushed him in the back, causing him to fall and hit his head. The Officers said nothing to Harris before taking him to the ground.
>
> In the second segment, as the three Officers were walking Harris back into the booking area he was still handcuffed and one of the Officers was lifting up on his hands behind his back. There was an officer on each side of Harris when Officer Williams instructed Harris to "kneel down." Harris could not comply with the instruction, however, because he was handcuffed and

[177] Dunn v. Matatall, 549 F.3d 348, 353 (6th Cir. 2008
[178] Id. (citing Graham v. Connor, 490 U.S. 386, 396 (1989)).

> one of the officers was pulling his arms up behind him. When Harris did not comply with the instructions to kneel, the Officers used a "takedown" maneuver to get Harris down on the floor. Officer Gaines, who was behind Harris at the time, struck Harris in the back of the knee, in an attempt to get his knee to buckle. Officer Roar administered two peroneal strikes to the left side of Harris's leg. Harris testified that the strikes by the officers caused all three of them to go down on the ground, that he felt knees striking his back, that his arms were being pushed up by both officers over his head.
> In the third and final segment, after the Officers had ignored Harris's cries for help and left him on the floor of Cell No. 3, one of the Officers entered the cell. Rather than respond to Harris's cries for help, that Officer told Harris to get up. When Harris responded that he could not move, that Officer kicked Harris in the ribs and said "Looks like we got us a broke nigger here."
>
> We conclude that the Graham factors weigh against the Officers. Harris was accused of "speeding, DUI and failing to appear in mayor's court." Relatively speaking, these are not particularly serious crimes and none of them involve violence. In addition, Harris did not pose an immediate threat to the Officers or anyone else at the Circleville City Jail.
>
> It is undisputed that Harris was handcuffed during each of the incidents in question. During the first segment he was surrounded by the three Officers and during the second segment he was surrounded by the Officers *and* Troopers McManes and Cooper. Indeed, the Officers testified that they did not feel threatened by Harris or that they were in any imminent danger from him. Finally, under Harris's version of the facts, he did not actively resist at any time.

The Court agreed that a constitutional violation did, apparently occur, and further, that a "clearly established legal norm precluding the use of violent physical force against a criminal suspect who has already been subdued and does not present a danger to himself of others" was clearly prohibited.

The Court upheld the denial with respect to the excessive force claims.

With respect to the medical issue, The Court noted that a "medical need is objectively serious where a plaintiff's claims arise from an injury or illness 'so obvious that even a layperson would easily recognize the necessity for a doctor's attention."[179] The Court agreed that was clearly the case in this situation, and specifically, that his statements about being shocked warranted further investigation. At least two of the officers admitted realizing that there Harris was claiming symptoms consistent with a serious injury, and at least one stated that he assumed another officer was arranging for it. As such, the officers "were aware of facts from which the inference could be drawn that a sufficiently serious medical need existed, and that they drew that inference." The right to medical treatment was clearly established.[180]

The Court upheld the denial of summary judgment with respect to the medical needs claim, as well.

Finally, Harris argued that the actions were taken out of racial animus, and given the evidence presented (including specific statements regarding his African-American race), the Court agreed that claim could also move forward.

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[179] Blackmore v. Kalamazoo County, 390 F.3d 890 (6th Cir. 2004).
[180] Fitzke v. Shappell, 468 F.2d 1072 (6th Cir. 1972).

Bertl v. City of Westland. 2009 WL 247907 (6th Cir. 2009)

FACTS: On March 1, 2004, a Westland (Michigan) PD officer arrested Bertl for DUI – he had a blood alcohol of 0.26. He was arraigned and the court noted that he was shaking. He explained he had not had his medication since the day before. The trial court considered that he was suffering from delirium tremens (D.T.s) or alcohol withdrawal. Later that same day, sheriff's transport officers arrived to pick up prisoners, including Bertl. They made a stop at another police department and noted that "Bertl could not clearly respond to questions." Because they could not transport ill prisoners, they returned him to the Westland PD.

The next day, another sheriff's office[181] arrived to pick up Bertl. The deputies were told that he "had delirium tremens, but that he had taken his medicine recently and obtained medical clearance for the transfer." During the trip, however, "Bertl became increasingly delusional." Upon arrival, he had to be carried, and one of the deputies told his supervisor that he might need medical attention. A nurse was called. Later testimony from prisoners indicated that "Bertl visibly suffered from a severe medical condition," and that he "appeared unconscious and unresponsive and that he shook uncontrollably." The nurse did not enter the cell, refusing to evaluate him until he'd been dressed in "prison clothes." The guards were told to change his clothes and then bring him to the clinic. When the guards attempted to do so, they realized he'd stopped breathing. Prison medical staff did CPR and he was transported by ambulance to the hospital. He was pronounced dead at that time.

Bertl's estate representative filed suit under 42 U.S.C. §1983, against the City of Westland and other defendants. The case was removed from state court to federal court. During various proceedings, various defendants were dismissed, leaving only the nurse (Thomas) still a party to the lawsuit.

Bertl appealed some of the dismissals.

ISSUE: Is a lack of response to an obvious medical need actionable?

HOLDING: Yes

DISCUSSION: Thomas objected to the use of certain hearsay statements (including statements by prisoners and other officers) in the summary judgment motion, citing Sixth Circuit precedent. Bertl argued it was appropriate because the information would be "presented in an admissible form at trial." The Court stated that the only issues before it were whether Thomas "violated Bertl's constitutional or statutory rights, and whether those rights were clearly established at the time of Thomas' alleged misconduct." The Court agreed that "deliberate indifference to the medical needs of prisoners" is a violation of the Eighth Amendment. There is both an objective and subjective component to the analysis. The Court agreed that the objective element is met when the "medical need is sufficiently serious when it is obvious to a lay person."[182] The Sixth Circuit had "recognized that delirium tremens constitutes a serious medical need."[183] With respect to the subjective element, the Court found that Thomas was aware of facts that "could infer that a substantial risk of harm existed, and that she also drew that inference." Further, she did not comply with "stated jail policy" which required her to have called for a doctor immediately based upon the symptoms observed. The Court found that in the face of Bertl's "glaring symptoms," Thomas's failure to take appropriate action could constitute deliberate indifference to Bertl's serious medical need.

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[181] It is not clear from the opinion why both the Isabella County Sheriff's Department and the Wayne County Sheriff's Department would both be picking up prisoners from the same location.

[182] Blackmore v. Kalamazoo County, 390 F.3d 890 (6th Cir. 2004).

[183] Speers v. County of Berrien, 196 F.App'x 390 (6th Cir. 2006).

Finally, the Court held that the right to medical care was clearly established, and upheld the denial of summary judgment on behalf of Nurse Thomas.

Everson v. Leis, 556 F.3d 484 (6th Cir. 2009)

FACTS: On April 19, 2003, Everson was at the Northgate Mall in Hamilton County, Ohio. Deputy Sheriff Wittich (Hamilton County, Ohio, SO) and another, unknown, deputy were working security at the mall. Everson suffered an epileptic seizure and, allegedly, the deputies "physically agitated and attacked him," even though they knew he was having a violent seizure. When he came out of the seizure, he told the deputies he was "an epileptic and that their conduct was likely to cause him to suffer another seizure." However, he claimed, they "assaulted him, including hogtying him, and took him into custody." He requested medical care, but was denied. He was charged, but the charges were later dismissed. He also claimed that although he advised the detention center of his epilepsy, no one from the medical staff saw him or treated him, and that he suffered multiple seizures during his stay. He remained at the jail from Saturday night through Monday morning. The deputies later claimed he became violent, both with them and with EMS.

Everson sued the Sheriff, the deputies and Northgate Mall, among others, under 42 U.S.C. §1983, and the Americans with Disabilities Act (ADA). For procedural reasons and because of a change in counsel, Everson was permitted to file responses later than would normally be allowed. The defendants appealed.

ISSUE: May an officer ignore evidence of a medical condition?

HOLDING: Yes

DISCUSSION: The defendants argued that it was improper for the court to "refuse to resolve a question of qualified immunity raised before discovery is closed, but must instead determine whether qualified immunity is proper or whether further discovery is necessary to resolve the question."[184] The Court noted that "questions of qualified immunity should be resolved 'at the earliest possible stage in litigation,' or else the 'driving force' behind the immunity – avoiding unwarranted discovery and other litigation costs – will be defeated."[185] The Court agreed that it was appropriate to permit an appeal of the trial court's refusal to rule, and its decision to extend discovery without a specific assertion from Everson as to what he hoped to discover.

First, the Court addressed the claims against Sheriff Leis. The allegations against the Sheriff was that the Sheriff failed to train his employees (at the jail) to provide proper medical care. The Court, however, agreed that the claim was never properly asserted that claim, and further, that §1983 liability "must be premised on more than mere respondeat superior." A failure to train requires that a supervisor "either encouraged the specific incident of misconduct or in some other way directly participated in it." Since Everson made "no specific allegations of a failure to train by Sheriff Leis," the court found that the Sheriff was entitled to qualified immunity on the claim against him, personally.

With respect to Deputy Wittich, Everson claimed that the deputy permitted an employee of the Northgate Mall to illegally search him when he was looking for some form of identification. In fact, Everson's claim did not even make it clear he was trying to place a claim for the illegal search against Deputy Wittich in the first place. The Court agreed that Everson "never clearly made out an excessive-force claim in his complaint." Everson agreed he did not recall much of what occurred during his seizure, while the deputy cross-asserted that

[184] Skousen v. Brighton High School.
[185] Pearson v. Callahan,

Everson was violent toward the deputies and the EMS personnel. The Court found that Deputy Wittich was "immune from personal liability" on the excessive-force claim.

Everson did clearly allege claims of false arrest and malicious prosecution. A false arrest claim requires a showing that the "police lacked probable cause."[186] That requires that the officer have "reasonably reliable information that the suspect has committed a crime."[187] In addition, however, "in obtaining such reliable information, an officer cannot look only at the evidence of guilt while ignoring all exculpatory evidence," but must instead, "consider the totality of the circumstances, recognizing both the inculpatory *and* exculpatory evidence, before determining if he has probable cause to make an arrest." Also, "[p]olice officers may not 'make hasty, unsubstantiated arrests with impunity,' nor 'simply turn a blind eye toward potentially exculpatory evidence known to them in an effort to pin a crime on someone.'"[188] The deputy argued that Everson's verbal threats and physical assaults on mall personnel, the deputies and the EMS crew clearly met the elements of assault and disorderly conduct. The Court, however, noted that once he emerged from his seizure, there was no evidence that Everson was physically or verbally abusive. The deputy knew that Everson was suffering from an epileptic seizure and thus his actions were not made while he was fully conscious of his actions. Further, Ohio law required that an officer make a diligent effort to determine if a subject is suffering from diabetes or epilepsy before making a decision about charging with a crime. However, the law does not indicate that the arresting officer must refrain from making an arrest under such conditions and the Court concluded that the deputy was entitled to qualified immunity because the law was not clear

After declining to address several other issues, the Court ruled in favor of the Sheriff and Deputy Wittich on the claims that had become ripe for review at the time, leaving in abeyance those claims for which they had not yet sought qualified immunity.

Spears v. Ruth & City of Cleveland, 589 F.3d 249 (6th Cir. 2009)

FACTS: In Feb., 2006, Officer Ruth (Cleveland PD) was dispatched to a call of a man (McCargo) "running up and down the street, hallucinating and otherwise behaving bizarrely." McCargo told Officer Ruth that he'd smoked crack. EMS was summoned but decided he didn't need transport – although it was later disputed whether Ruth told them of McCargo's behavior prior to their arrival. It was also unclear whether he "affirmatively refused medical treatment or remained silent when asked if he needed help." McCargo was arrested for public intoxication and transported. He kicked violently at least once in the vehicle. At the jail, he was "rocking back and forth stating don't let the dogs get me." The nurse checked him and apparently cleared him for admission. Again, there was dispute as to whether the jail personnel was told that McCargo had been smoking crack and that one of the EMT's "had noticed something white in McCargo's mouth." McCargo continued to hallucinate. He was placed in a restraint chair, "for his own safety," and Tased to "relax his muscles." He was restrained for over three hours, during which time he appeared calm. When he was released, he "began to shake and spit up blood and then became unconscious." He was taken to the hospital and lapsed into a coma, and died eleven months later.

> At the time that Officer Ruth encountered McCargo, two conflicting police department policies regarding the transportation of individuals for medical services existed. One policy instructed police who encountered detainees exhibiting signs of 'excited delirium' to transport them to the hospital for treatment, making no provision for officers to engage the services of an EMS vehicle instead. However, Police Chief Wes Snyder's concurrent written memorandum

[186] Fridley v. Horrighs, 291 F.3d 867 (6th Cir. 2002).
[187] Gardenhire v. Schubert, 205 F.3d 303 (6th Cir. 2000).
[188] Ahlers v. Schebil, 188 F.3d 365 (6th Cir. 1999).

prohibited his officers from transporting any individual to the hospital in a police vehicle for medical services.

McCargo's estate argued that the police prevented Officer Ruth from taking McCargo directly to a hospital and contributed to his death. The policy did provide some instruction on how to recognize excited delirium, but it wasn't clear whether Officer Ruth had been trained on the policy.

The estate sued and the defendants moved to dismiss. Both the City of Cleveland and Officer Ruth were denied dismissal and both appealed.

ISSUE: Does evidence that EMS did not recognize a medical need absolve the officer who also failed to recognize that need?

HOLDING: Yes

DISCUSSION: With respect to Officer Ruth, the Court noted that "several factual disputes exist[ed] regarding how obvious McCargo's symptoms actually were to Officer Ruth, the EMTs, and jail officers." However, since both the EMS crew and the nurse "presumably had a greater facility than the average layperson to recognize an individual's medical need," and both believed he didn't need to go to the hospital, the Court agreed it would not have been obvious to Officer Ruth. As such, they found that they had not proved the "obvious existence of a sufficiently serious medical need."

Further, the Court did not find that his alleged failures to share information with the EMTs and the jail rose to the level of a constitutional violation, and that he was deliberately indifferent to McCargo's needs. As such, Ruth was entitled to qualified immunity.

Arnold v. Lexington-Fayette Urban County Government, 2009 WL 3837655 (6th Cir. 2009)

FACTS: In mid-August, 2005, Cornett was jailed for public intoxication. A few hours later, he had slipped into a coma, and died in a hospital a few days later. His estate filed suit against a number of parties, including LFUCG employees who had contact with Cornett. The defendant employees requested summary judgment, which the District Court denied. They then took an interlocutory appeal.

ISSUE: Must the Court look at the actions of each individual defendant in a medical needs case, before dismissing them from the action?

HOLDING: Yes

DISCUSSION: The Court noted that in a qualified immunity action, it is necessary to do a "individualized assessment of the actions of each defendant," before making a decision.[189] In this case, it was not done. Claims of this nature, a "deliberate indifference to serious medical needs," during a pretrial detention, must be evaluated under the Fourteenth Amendment, rather than the usual Eighth Amendment analysis. Claims under the Fourteenth Amendment have both an objective and subjective component. First, objectively, Cornett's estate would have to show that he did, indeed, have a "serious medical need that would have been obvious to a layperson." Next, subjectively, it would have to be showed that the specific "official being sued

[189] Phillips v. Roane County, Tenn., 534 F.3d 531 (6th Cir. 2008).

subjectively perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference, and that he then disregarded the risk."[190]

During the course of Cornett's incarceration, each of the named defendants had contact with him, and were allegedly indifferent to his serious medical needs. However, the District Court did not "address the *individual* culpability of each" of the defendants. In other for liability to attach, "he or she must have known of Mr. Cornett's serious medical need and knowingly disregarded the substantial risk that it entailed." The Sixth Circuit tasked the trial court with determining what each of the defendants "knew about Mr. Cornett's condition, when he or she knew it, and what, if anything, he or she did to address it." Under procedural law requirements, for this type of action, any "contested material facts" must be resolved, at this point, in favor of Cornett's estate.

The judgment was vacated and the case remanded.

42 U.S.C. §1983 - MISTAKEN IDENTITY

Flemister v. City of Detroit, 2009 WL 4906904 (6th Cir. 2009)

FACTS: On November 2, 2004, Sanders was arrested by Detroit PD. However, he gave his name as Anthony Flemister and also gave Flemister's birth date. (Flemister and Sanders are cousins.) Sanders did not appear for arraignment and a felony arrest warrant was issued under the name of Flemister, of course. Flemister learned of this when he was stopped twice by police outside of Detroit. In both instances, he was detained only a few hours and then released, "because the Detroit police declined to come and take him into custody." Because he was applying for a job that required a criminal background check, Flemister decided to get it straightened out. Unfortunately, instead he was arrested, booked and fingerprinted on the outstanding warrant. He complained of the mistake, to no avail. His mother contacted several officers, including the officer involved in the original arrest and "gathered enough information … to figure out that it was Sanders who had used [Flemister's] identity when he was arrested." Several days later, after he was transferred to the Wayne County Jail, Flemister continued to protest and ask that they look at the fingerprints or the photo from the original arrest. A few days later, when he was brought to a preliminary hearing, the charges were dismissed because the investigating officer realized he was not the correct subject.

Flemister filed suit against Detroit and a number of Detroit police department employees, as well as against Wayne County and several individual jail deputies, under 42 U.S.C. §1983. The defendants all moved for summary judgment, after limited discovery, and the trial court concluded that Flemister's "constitutional rights were not violated and that he could not prevail on his state law claims," either. Flemister appealed.

ISSUE: May some mistaken identity cases not be constitutional violations?

HOLDING: Yes (see discussion)

DISCUSSION: "To establish a §1983 claim against an individual or municipality, the plaintiff must identify a right secured by the Constitution or laws of the United States and the deprivation of that right by the person acting under color of state law."[191] Flemister "did not challenge the validity of the warrant," but instead, "alleged a constitutional violation of the kind articulated in Baker v. McCollan."[192] In that case, the Court

[190] Comstock v. McCrary, 273 F.3d 693 (6th Cir. 2001)
[191] West v. Atkins, 487 U.S. 42 (1988).
[192] 443 U.S. 137 (1979).

"suggested that 'mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of 'liberty … without due process of law.'" In Baker, the Court noted that the Constitution did not guarantee that "only the guilty will be arrested." The Court noted that the "question of how long such a mistaken-identity detention must be for it to implicate a constitutional due process right was not resolved by the Court in Baker." (In that case, the subject was held for approximately 7 days.) As in Baker, Flemister argued that the mistake could have been immediately cleared up if someone would have checked the fingerprints and photo and the trial court agreed that it was "troubling that a comparison was not made sooner." In a case after Baker, Gray v. Cuyahoga County Sheriff's Dept., the subject was held for 41 days, and that was considered sufficient to press a claim.[193] Two other cases considered 12 and 30 days, respectively, to be sufficient.

The Court agreed that this case is "materially indistinguishable from Baker," and as such, found there was no constitutional deprivation of rights. The Court upheld the dismissal of the federal and the state claims.

42 U.S.C. §1983 - ARREST WARRANT

Flowers v. City of Detroit, 306 Fed.Appx. 984 (6th Cir. 2009)

FACTS: On April 20, 2004, Detroit police officers responded to a shooting, finding Smiley dead with a gunshot wound to the head. Detectives Newman, Staples, Fisher and Jackson were assigned to investigate the homicide. They spoke to Rounds, who was at the apartment when Smiley was shot. She gave a false name and later admitted she did so because she had outstanding warrants. She stated that Smiley let two men inside, one man named Steve and another she did not see and did not know. They went into a bedroom and she heard a bang. The two men emerged, threatened her, forced her into a bedroom at gunpoint, stole items and then left. She further stated that Flowers had spent the night at the apartment, but left early to go to work. The investigators visited Flowers at work and, according to Flowers, ordered him to go with them to the police station to assist in the investigation. He told the officers he was at home with his fiancée, Sharon Jackson, at the time of the murder and agreed he'd spent the night at the apartment.

Rounds later stated that she had lied about not being able to identify the second man, and admitted it was Flowers. She claimed he had threatened to kill her. Learning that the police had surrounded his home, Flowers and Jackson went to the police station, and Flowers was arrested. Jackson was willing to provide an exculpatory statement, but the investigators did not get a written statement from her. Flowers was arrested. The warrant request did not "mention Rounds' previous statement, nor Jackson's offer to give a statement that she was with Flowers at the time of the murder." At trial, Rounds did not appear and the trial court dismissed the murder charges.

Flowers sued the four detectives, and other parties, under 42 U.S.C. §1983, in state court, and the case was removed to federal court. The District Court granted the motion for summary judgment in favor of the officers and Flowers appealed.

ISSUE: Does simply leaving out potentially exculpatory evidence make a warrant invalid?

HOLDING: No

[193] 150 F.3d 579 (6th Cir. 1998).

DISCUSSION: The Court looked at whether they were precluded from "challenging the state court's determination of probable cause at a preliminary examination hearing."[194] The Court agreed that a "state court determination of probable cause did not preclude a subsequent malicious prosecution claim where the plaintiff alleged that 'the defendant-officers had knowingly supplied the magistrate with false information in order to establish probable cause.'"[195] In Hinchman v. Moore[196] and Peet v. City of Detroit[197] the court agreed that the "exception to the usual preclusive effect of a state court probable cause determination applies when there is evidence of a 'police officer's supplying false information to establish probable cause.'" However, the Court observed that Rounds' previous statement, which was brought out at the preliminary hearing, did not make her, necessarily, a false witness.

Flowers also argued that the failure to mention that Jackson was willing to give a statement made the warrant "false and incomplete." He also maintained that the investigator should have included information provided by another witness that she saw two men leaving in a light blue truck. Although the Court agreed that "in determining probable cause police officers may not 'simply turn a blind eye toward potentially exculpatory evidence known to them in an effort to pin a crime on someone," simply 'leaving out of a warrant request the fact that the accused's fiancée is willing to offer an alibi does not otherwise negate probable cause."[198] The Court noted that "[a]lthough in some cases material omissions from a warrant request may be so egregious as to make it 'false' for purposes of establishing probable cause," that the evidence in this case did not support such a finding.

The Court found that Flowers was precluded from relitigating the existence of probable cause and affirmed the District Court's judgment.

Evans v. City of Etowah, 312 Fed. Appx. 767 (6th Cir. 2009)

FACTS: In August, 2004, Evans's son, Noble was arrested. He was required to live with Evans in Etowah, Tennessee, as a condition of his pretrial release and to call his bonding agent daily from her home.

In October, 2005, he failed to appear at a court proceeding and a bench warrant was issued. The bonding agent (which was outside Tennessee) talked to Officer Nelms (Etowah PD) about arresting Noble on the warrant. They also mentioned to Nelms that "Evans had lied to them about Noble's whereabouts, stating that Noble was not at her home." (They had gotten a call from Noble that originated from Evans's home.) On November 22, 2005, Officers Nelms and Crawford went to the Evans home to arrest Noble. When they arrived, Evans looked out and later stated that she went to load a rifle – as she did not apparently recognize the pair as officers. When they identified themselves, she laid down the weapon and headed to the door, but they "kicked in the door before she could open it, which caused her to fall backwards onto the floor." She stated that they shined a light into her eyes and "repeatedly yelled 'where is he?'" When they told her who they were looking for, she called for Noble to come out, which he did. He was arrested, as was Evans. Nelms, however, stated that he "knocked on the door several times and announced that he was from the police, but there was no response from inside the house." When someone finally did respond, Nelms stated that he would force the door if necessary, but the door was "opened without incident." After denying the Noble was there, she finally admitted that he was in the house. Noble was found in a bedroom closet and arrested.

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[194] See Darrah v. City of Oak Park, 255 F.3d 301 (6th Cir. 2001).
[195] Id.
[196] 312 F.3d 198 (6th Cir. 2002)
[197] 502 F.3d 557 (6th Cir. 2007.
[198] Ahlers v. Schebil, 188 F.3d 365 (6th Cir. 1999); Coogan v. Wixon, 820 F.2d 170 (6th Cir. 1987).

Evans was charged as an accessory after the fact under state law, but the grand jury did not indict. She filed sued on multiple grounds, but the only relevant charge was under 42 U.S.C. §1983 for unlawful arrest. The defendant officers requested summary judgment but the trial court denied it, finding that Evans's account showed no intent to hinder the officers in arresting Noble. Nelms and Crawford appealed.

ISSUE: May an officer ignore all exculpatory evidence when making an arrest?

HOLDING: No

DISCUSSION: The Court reviewed the Tennessee statute for the necessary elements to have made the arrest. The Court agreed that the "facts occurring prior to [Nelms and Crawford's] arrival at Evans's home [did] not support probable cause to arrest Evans as an accessory." (The Court noted that Noble was required to live at Evans's home, but not necessarily that he be there all of the time.) Counsel for the officers conceded that "these facts do not support probable cause or an intent to hinder arrest or actions taken upon that intent." As such, the Court looked to the "facts occurring after [the officers'] arrived at Evans's home" and found that the additional facts "do not provide enough additional evidence to create probable cause for arrest."

The Court elaborated that a delay in answering the door "does not alone support intent to harbor because there are numerous legitimate reasons for a delay." That "Noble was in a dark room is not indicative of Evans's intent to harbor, especially given that it was nighttime and that, under these facts, Evans cooperated with the police." The Court noted, specifically, that "[A]n officer cannot look only at the evidence of guilty while ignoring all exculpatory evidence."[199] Further, the Court agreed that, construed in Evans's favor, as required at this point, the facts indicated that the officers violated Evans constitutional rights. The Court found that Evans had produced enough facts to permit the case to go forward for further discovery and trial.

Conner v. Southfield (MI) Police Department, 2009 WL 3232100 (6th Cir. 2009)

FACTS: On Sept. 5, 2005, Southfield PD officers stopped a speeding vehicle. Rodney Conner was driving and his wife, Terri, was the passenger. The officers found the vehicle on a stolen database and Terri agreed that although it had been stolen, it had subsequently been recovered. She had documents to that effect. The officers then discovered Rodney Conner had a valid arrest warrant and he was arrested. Searching the car, they found a gun under the center console. Both Conners were arrested for the weapon.

At the station, Terri Conner was questioned about her husband's possession of the gun, as the detective, Pieroni, thought he might be involved in drug trafficking. She claimed he threatened to implicate her in other crimes if she didn't say the gun belonged to her husband. Eventually both were released from custody.

Terri Conner sued the Southfield PD and Pieroni under 42 U.S.C. §1983, alleging that she was unlawfully arrested and unreasonably detained. Eventually the PD was dismissed from the action. However, it refused to grant Pieroni summary judgment, apparently because "Conner alleged that Pieroni knew she was not guilty of anything." Pieroni appealed.

ISSUE: May an officer be sued for false arrest when the officer did not actually make the arrest?

HOLDING: No

[199] Gardenhire v. Schubert, 205 F.3d 303 (6th Cir. 2000).

DISCUSSION: First, the Court noted that no claim under illegal arrest can be made against Pieroni, because "he was not present at the arrest and he did not make the decision to arrest." In any event, however, there was sufficient probable cause to arrest her for the charge, because it was hidden in her car and she did not have a license for it. Further, Conner did not assert, and the facts did not indicate, that "Pieroni was responsible for the decision to keep her in custody." His only action was interviewing her.

Because the Court found no constitutional violation, there was no need to decide whether the right was clearly established. The judgment of the lower court was reversed and Pieroni accorded qualified immunity.

Denton v. Rievley, 2009 WL 3789913 (6th Cir. 2009)

FACTS: On September 9, 2006, Officer Rievley (Dayton, TN, PD) responded to a domestic violence call. Brandon Denton (the victim) had gone to the jail to complain about an assault by his father (Roy) and his brother (Dustin). Rievley saw marks on Denton's neck, consistent with strangulation, and abrasions on his arms and face. (He confirmed that Denton did not have the marks when he was dropped off at the home by a co-worker.) Rievley and other officers proceeded to the Denton home. Roy met the officer at the door and Rievely "smelled alcohol." He also saw broken eyeglasses lying on the porch. He decided to arrest both men and grabbed Roy as he turned away. Officers entered in search of Dustin, finding him after a short search. Roy later claimed that "he was standing three feet inside his home and never crossed the threshold" - and that he was dressed only in "sleeping shorts." He maintained that "Rievley forced his way across the threshold and arrested him inside the home."

Roy and Dustin Denton both filed suit against Rievley, under 42 U.S.C. §1983 and various state claims. The District Court found that the officer had probable cause to arrest Roy, but that he was not entitled to summary judgment because (viewing it from Denton's version of the facts) "Rievley had arrested Denton inside his home without a warrant." Further, the Court noted, any reasonable officer would have known of clearly established law prohibiting warrantless in-home arrests." The Court did, however, grant summary judgment on the claim of excessive force and assault.

Rievely appealed.

ISSUE: May an individual be arrested in their home for a domestic violence assault if the officer lacks a warrant?

HOLDING: No (but see discussion)

DISCUSSION: The Court agreed that the doorway, itself was a public place, but noted that Denton argued that he never "left his home nor exposed himself to public view." Since there was "no consent or exigency justifying Rievley's entrance into [the] home, Denton's arrest violated Payton.[200]" Rievley argued that Tennessee law preferred an arrest in a domestic violence case. The Court, however, noted that arrest was not mandated and the law was "silent on whether its preference for arrest applies inside a home when an officer lacks consent or exigent circumstances." The Court did not find that Tennessee law permitted such arrest "in light on long-standing Supreme Court precedent holding that such arrests violate the Fourth Amendment."

The Court upheld the denial of summary judgment in favor of the officer with respect to the entry.

[200] Payton v. New York, 445 U.S. 573 (1980).

42 U.S.C. §1983 - PURSUIT

Jones v. Byrnes, 585 F.3d 971 (6th Cir. 2009)

FACTS: On Jan. 23, 2006, Officers Byrnes and Lentine (Redford Township PD) were on patrol; Officer Lentine was driving. At about 5 a.m., they received a call on an armed robbery at a convenience store and that two black males were fleeing on foot. As they approached the store, the officers saw a Ford Taurus driving at a high rate of speed, on a "well-known escape route used in previous crimes in that area." They suspected it was the getaway car and tried to pull it over. Instead of stopping, however, it accelerated. During the chase, the vehicle ran red lights and stop signs, with the officers following. The in-car video showed the "driver and passenger of the Taurus throwing objects out of the windows at various points during the chase." Four miles into the chase, the headlights on the Taurus were turned off but it continued its flight. About two miles further, the Taurus ran a red light and struck Jones, who was on his way to work. Jones died.

Jones's estate filed suit against the officers. The officers requested and were granted, summary judgment on the basis of qualified immunity. Jones's estate appealed.

ISSUE: Is a police pursuit that does not shock the conscience permissible?

HOLDING: Yes

DISCUSSION: The Court reviewed the law of qualified immunity. In particular, it noted that the U.S. Supreme Court had abandoned the requirement in Saucier v. Katz[201] to follow a rigid, two-step, sequential process to make the determination. Instead, in Pearson v. Callahan, the court had recognized that the "sequential mandate was cumbersome and often forced courts to decide constitutional questions unnecessarily, and also recognized that the sequential mandate was impossible to force on any given judge's thought process."[202] It permitted the use of the Katz process if appropriate in the case, but no longer required it. It left it to the decided courts "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." (The Court noted, however, that "because Pearson left in place Katz's core analysis, all pre-Pearson case law remains good law.")

Since this case involved a police chase, the Court looked to Sacramento v. Lewis, and discussed the "shocks the conscience" standard it set. In that case, the Court noted that "[a] police officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom and, on the other, the high-speed threat to everyone within stopping range, be they suspects, their passengers, other drivers, or bystanders." The Court also applied Lewis in Meals v. City of Memphis.[203] Notably, in both cases, the officers were accused of having violated department policy during the chase. In Meals, the court had reversed the jury finding in favor of the plaintiffs and ruled that there "was no evidence of an intent on the officer's part to harm the fleeing suspect or to worsen his legal plight." The Court "specifically rejected the argument that the officer's multiple violations of departmental policy at the very least raised a question of fact from which one could infer malice on the officer's part."

Using this analysis, the Court noted that the underlying offense in this case (armed robbery) was actually more serious and "tilts the balance much further towards continuing a dangerous chase than does chasing transgressors of the traffic laws." As such, if Lewis and Meals, which did involve traffic offenses, did not shock

[201] 533 U.S. 194 (2001).
[202] 129 S.Ct. 808 (2009).
[203] 493 F.3d 720 (6th cir. 2007).

the conscience, than neither could this case do so. (In a footnote, as well, the Court made reference to Scott v. Harris[204], stating that although that case was brought under the Fourth Amendment rather than the Fourteenth Amendment, that the "point still rings true." In that case, the Court noted that it was "loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people's lives in danger… The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness.") Although unnecessary in the decision, the court also noted that even if there was a violation of a constitutional right, it certainly was "not clearly established at the time of the incident that actions of that sort crossed the constitutional line. In fact, no cases existed at the time of the opinion, in any circuit, that would give guidance to the officers as to what *would* shock the conscience, just what *would not*.

The Court upheld the summary judgment in favor of the officers.

42 U.S.C. §1983 - USE OF FORCE

Smoak v. Hall and Bush, 2009 WL 2778101 (6th Cir. 2009)

FACTS: On January 1, 2003, the Smoaks (Pamela and James) and Pamela's teenage son, Brandon were traveling home to North Carolina from a holiday visit to Nashville. At a stop, James accidentally left his wallet on the roof of the car and drove off. Within moments, a caller reported that a car drove past her at a high rate of speed and that "there was money flying all over the interstate." Tennessee Highway Patrol officers met the caller to recover the money, which was later discovered to be $445 in currency. Troopers were dispatched to the Cookeville area to look for the vehicle. Dispatch originally believed a robbery had occurred, but the dispatcher (Pickard) agreed that some time later, after they confirmed the amount of the cash and the discovery of the wallet, that he no longer believed that to be the case. However, "Pickard did not relay this information to the other dispatchers until after the Smoak's station wagon had been stopped."

Several BOLOs were put out, some stating that the vehicle "was possibly involved in a robbery." Trooper Bush (THP) spotted the vehicle and followed it for 8 miles, during which time it committed no traffic infractions. He confirmed that the vehicle registration matched the ID found with the cash. He was told to stop the car, although there was confusion about who called for back-up for the stop. (In fact, back-up was requested, both from THP and from nearby Cookeville officers. Specifically, one dispatcher stated that "we're fixing to have *a felony stop* on a vehicle . . . possible *armed* robbery out of Nashville." Two THP troopers and two Cookeville officers made the stop. Most of the ensuing events were recorded by Bush's video camera.

> Once the station wagon pulled over, neither the THP troopers nor the Cookeville officers approached the car. Instead, Bush called to the "driver" over the loudspeaker, and instructed him to exit the vehicle, place his hands in the air, walk backwards around the car, and finally, to get on his knees with his hands laced behind his back. Trooper Bush did the same for the two passengers — first Pamela Smoak and then her son Brandon. Only after the Smoaks were kneeling on the ground did the troopers approach and, somewhat frantically, apply handcuffs, while the obviously confused and increasingly agitated Smoaks demanded to know why they had been stopped.
>
> As the Smoaks knelt on the pavement and troopers applied the handcuffs, the two Cookeville officers — one wielding an assault rifle and the other a shotgun — prowled a few feet away, their raised guns tight against their shoulders and trained on the Smoaks. Although this

[204] 550 U.S. 372 (2007).

gesture was superficially menacing and surely intended as an intimidating show of force, the way these two officers paced and shuffled behind the troopers, wavering guns gripped white-knuckled in their hands, exhibits such nervousness and fear that, even on video, the tension is palpable and the ensuing events are almost predictable. It is also worth noting that, prior to trial, the troopers testified that pointing a gun at a suspect, absent the justification for deadly force, is a significant departure from customary professional police practices, and that the correct position of an officer's gun is in the "down ready" position until deadly force is warranted. Nothing in this record provides a justification for deadly force, and this was *not* the "down ready" position.

Meanwhile, handcuffed on the side of the highway and still wholly uninformed about why they had been stopped, the Smoaks asked the troopers several times to "please shut the door[s]" of the station wagon so that their dogs would not escape from the car onto the highway. The troopers ignored these requests. When Mrs. Smoak's son, Brandon, asked Trooper Phann if he could close the passenger-side door, Phann ordered him not to move. Lieutenant Andrews approached the driver's side of the car, determined that there were no other passengers, and closed the driver-side door. At this point, Mrs. Smoak can be heard clearly, saying: "My dog is not mean, he will not hurt you."

While Phann was handcuffing Brandon, the Smoak's one-year-old bulldog/bull terrier mix, General Patton, jumped from the still-open passenger-side door and — with ears up and tail wagging — bounded through the tall grass alongside the highway. According to the Smoaks, the dog was headed toward James Smoak, but Eric Hall, the Cookeville police officer with the shotgun, moved to intercept; according to Hall, however, the dog was pursuing him and he was retreating in fear. Either way, Hall back-peddled in a slight semi-circle, toward the handcuffed, prone, and now shouting Smoaks, with the excited dog following (tail wagging vigorously). Then, directly in front of the camera, when the dog had almost reached Hall, Hall stopped, leaned down with the shotgun and — with the gun's muzzle almost touching the dog's face — fired. The dog's head exploded in a mist of blood, bone, and brain, and its lifeless body dropped from the camera's view.

James and Pamela Smoak both jumped to their feet, James wailing "You shot my dog, you shot my dog," and Pamela screaming and crying "Why did you do that?" Trooper Phann still had hold of Brandon and had not allowed him to his feet. While Pamela stood screaming, Lt. Andrews and Trooper Bush grabbed the still-handcuffed and now grief-stricken and sobbing James Smoak and drove him to the ground, the weight of all three men landing on James's left knee. With James face-down on the ground, the two troopers knelt over him and Lt. Andrews knelt on his head, pinning it to the ground. James ultimately needed surgery to repair the damage to his knee.

Meanwhile, the Cookeville officers turned their guns on Pamela Smoak and ordered her to get back down on her knees, which she did without further violence on the part of the officers. The troopers put the Smoaks into separate patrol cars, after which Bush and Hall can be seen on the videotape grinning and laughing. At 5:23 p.m., Bush advised dispatcher Brock that the Smoaks were in custody and Brock should "ask Nashville the charges." Brock replied that no robberies had been reported and that James Smoak was not wanted for any crimes. At that point, Andrews and Bush determined that a mistake had been made, but the last of the handcuffs was not taken off for another 10 minutes.

> The entire incident lasted 29 minutes, even though the THP troopers knew within the first 20 minutes that the Smoaks were innocent of any wrongdoing. After the Smoaks drove off, the videotape records Bush lamenting that "I wish I had never stopped that f...ing car." It is perhaps telling, however, that far from showing remorse, Bush later testified that he would have conducted the same stop even without the information concerning a possible robbery because a report of a speeding car with a wallet and money coming out of it might indicate a car-jacking. Andrews and Phann, on the other hand, testified that they would not have conducted a felony stop had they had all the facts known to the dispatchers at the time. Pickard had actually joked with another dispatcher that someone had probably lost all his money, which reminded him of something his kids would do.

The Smoaks sued all parties involved, and also sued under Tennessee law. They settled with all of the Cookeville defendants, including the officer who actually shot the dog. The THP defendants moved for summary judgment. The trial court denied their qualified immunity motion, and the THP defendants appealed. When their interlocutory appeal was denied, the case was sent back for trial.

At a jury trial, on only claims against Lt. Andrews and Trooper Bush, the jury "concluded that Andrews had not used excessive force on James Smoak and had not injured him, but that Bush had." Smoak was awarded a little over $200,000 in damages. Bush appealed.

ISSUE: Is an officer who uses clearly excessive force entitled to qualified immunity?

HOLDING: No

DISCUSSION: Bush argued that the District Court erred by not giving him qualified immunity. The Court stated that Bush's argument was "that he could not have known that it would be improper to take hold of a man whose hands are bound behind his back and, using the full weight of his body, drive that defenseless man to the pavement." The Court, however, noted that:

> "The law is . . . clear that force can easily be excessive if the suspect is compliant."[205] "There is no government interest in striking someone who is neither resisting nor trying to flee."[206] We do not hesitate to say that "it would [have been] clear to a reasonable officer that his conduct was unlawful in the situation [Bush] confronted."[207] Hence, it was clearly established that the force Bush used was excessive.

The Court agreed, however, that if the officers were reasonably mistaken, that the force could have been excused and continued:

> Bush contends that he deemed this level of violence necessary at the time because Smoak was "noncompliant," though he concedes that Smoak's only "noncompliant act" was his visceral reaction to Officer Hall's horrifying shotgun blast to the dog's head — Smoak stood up when he had been ordered to kneel. But, in the totality of the encounter, Smoak had been fully compliant. Bush signaled Smoak to pull over, which Smoak did. Rather than approach the driver's side window to speak with Smoak — as every driver knows is customary in a traffic

[205] Wysong v. City of Heath, 260 F. App'x 848, 855 (6th Cir. 2008) (citing Champion v. Outlook Nashville, Inc. 380 F.3d 893 (6th Cir. 2004)).
[206] Id. (citing Smoak I, 460 F.3d at 784, and McDowell v. Rogers, 863 F.2d 1302, 1307 (6th Cir. 1988)).
[207] Saucier v. Katz, 533 U.S. 194, 202 (2001).

> stop — Bush shouted to Smoak over the loudspeaker, ordering him first to throw his keys out the window onto the highway; then to exit the car with his hands over his head and walk backwards to the rear of the car; and then to kneel down on the pavement. Smoak complied promptly with every instruction. As ordered, Smoak knelt there with his hands behind his back while Bush ordered Smoak's wife and step-son to exit the car and kneel on the pavement, hands up. Bush never explained to these hapless travelers why he had stopped them or why they were being thus treated, but Smoak nonetheless complied with every instruction. As the family knelt on the side of the highway — the Cookeville officers' guns trained on them — Smoak complied while the troopers secured his hands behind his back, handcuffed his wife and step-son, and looked in his car. Up to this point, Smoak was remarkably compliant — in fact, commendably so.
>
> When Hall shot the dog, Smoak stood up, crying out, "You shot my dog, you shot my dog!" Despite the fact that both Bush and Andrews had hold of the handcuffed Smoak, that Trooper Phann had hold of Smoak's step-son, Brandon, and that the two Cookeville officers had guns at the ready, Bush contends that he thought it was necessary to slam Smoak to the ground, i.e., that this use of force was, at most, a reasonable mistake. We disagree. Having reviewed the evidence, including the video, we find this use of force clearly unreasonable. Bush has not established that he was entitled to qualified immunity.

The Court affirmed the denial of qualified immunity and allowed the case to proceed.

NOTE: *The in-car video for this case is available through the Internet, contact the Legal Section for details.*

Wolfanger v. Laurel County, Ky, 308 Fed.Appx. 866 (6th Cir. 2009)

FACTS: On Oct. 15, 2005, Lee Wolfanger was shot by Laurel County Deputy Sheriff Poynter. Deputy Poynter was responding to a 911 call placed by Wolfanger's wife, Linda. She had "become alarmed after Lee Wolfanger, who had left the house following a minor family dispute, refused to come back inside." She told the dispatcher that he was armed with a handgun, was depressed, on pain medication and that she believed he might be a danger to himself or to others. Dep. Poynter arrived alone, and was directed by Mindy, Lee's daughter to where Lee was standing. Dep. Poynter asked Mindy to return to the house and ordered Lee to drop the weapon. Lee told the deputy to "get off his land" and something else, unintelligible. He then pointed the gun at the deputy, who fired one shot and struck Lee in the abdomen. Arriving officers found both a gun and a quad cane near where Lee fell. Lee Wolfanger subsequently died.

Linda Wolfanger filed suit under 42 USC §1983, alleging excessive force and a violation of the Americans with Disabilities Act. The Court awarded summary judgment to Poynter, upon his motion, and Wolfanger appealed.

ISSUE: Is simply speculation sufficient to overturn a summary judgment?

HOLDING: No

DISCUSSION: Linda and Mindy Wolfanger alleged that Lee Wolfanger was holding a cane shortly before he was shot and thus could not have been pointing a gun with that same hand. The Court, however, noted that "pictures in the record show the quad cane could stand on its own or be looped over the arm" and thus, "Lee Wolfanger could have both the gun and the cane on the right side of his body" at the same time. The Court found that the use of deadly force "was unfortunate, but not unreasonable."

The Court affirmed the dismissal of the action.

Sulfridge & Davis v. Huff & Moore, 313 Fed.Appx. 820 (6th Circ. 2009)

FACTS: On April 5, 2004, Davis drove Sulfridge to a Knoxville Wal-Mart. Sulfridge waited in the car and Davis went into the store. Sulfridge left the car at some point to look for Davis, but returned when she could not find him. Davis finally emerged and got into the driver's seat. At that point, stories diverged.

Sulfridge later testified that a uniformed individual (Knox County Deputy Sheriff Huff) came to the driver's side of the car and was "yelling and cussing" at Davis, "acting crazy," "in a rage" and began "banging his gun on the car and on the window of the car." Davis began to back the car out of the space and Huff walked with the car and yelled that if they didn't stop he would shoot. Davis stopped and put up his hands, but Deputy Huff fired a shot. The car rolled forward and Huff shot a second time. She stated that Huff was always at the side of the car and that she did not believe the car touched him. Huff's account, however, was the Sulfridge saw him at the side of the car before Davis started backing, and that she told Davis to "give back the merchandise and to stop." Davis then backed out and stopped. Huff stated that Davis then drove forward and back again, and struck Huff on the left thigh, and then drove forward again. Huff had to jump out of the way and then fired two shots. Davis drove to a nearby location, got out of the car and laid on the ground. Sulfridge got out and realized that Davis had been struck at least once. Officers arrived and ordered Sulfridge to the ground. She stated she complied but was kicked in the leg and told to roll over. She was taken into custody and questioned, but released to the hospital. Davis was also arrested and taken to the hospital, and the car was seized and towed.

Davis was indicted and pled guilty, eventually, to one count of assault and one of theft. Both Sulfridge and Davis sued, in separate cases, in both state and federal court but all four claims were consolidated in federal court. (The federal court eventually denied jurisdiction over the state claims.) The defendant officers, including Huff, requested summary judgment. The Court refused to grant summary judgment to Knox County or to Huff and Huff appealed.

ISSUE: Does the fact that a defendant pled guilty to assault mean that an officer's use of force in the same encounter was reasonable?

HOLDING: No

DISCUSSION: The Court addressed whether Huff met the standard to be awarded qualified immunity. The Court listed the following factors to determine if an officer's actions are reasonable:

1) the severity of the crime at issue;
2) whether the suspect poses an immediate threat to the safety of the officers or others; and
3) whether the suspect is actively resisting arrest or attempted to evade arrest by flight.[208]

The Court continued:

> The legal reasonableness of Huff's actions involves several questions of fact, including: (1) the circumstances that led to Davis backing the car out of the parking spot; (2) whether and how Officer Huff was struck by Sulfridge's car; (3) whether Davis threatened Huff by pointing

[208] See Sigley v. City of Parma Heights, 437 F.3d 527 (6th Cir. 2006)

> the vehicle at Officer Huff; (4) when and from where Officer Huff fired his first shot; (5) whether Davis drove the car toward Officer Huff after the first shot; and (6) when and from whether Office [sic] Huff fired his second shot.

The Court found it could not "resolve whether and to what extent Davis posed a continuing threat both to Officer Huff and the public" and as such, could not, at this point, "conclude that Officer Huff's use of force was reasonable as a matter of law." The Court also noted, however, that simply because Davis pled guilty to aggravated assault against Huff, that did not necessarily mean that "Officer Huff acted reasonably in employing deadly force during the encounter." The Court stated, "[t]o be sure, Plaintiffs may prevail on their claims against Officer Huff if they can show that the shots fired by Huff were not made in self-defense or in defense of others because Davis no longer posed a threat of harm at the time of the shootings." The Court declined to address issues raised in Sulfridge's case because they weren't presented for the District Court's consideration.

The Court affirmed the denial of qualified immunity and remanded the case for further proceedings.

42 U.S.C. §1983 - QUALIFIED IMMUNITY

Jones v. Garcia & Miller, 2009 WL 3109826 (6th Cir. 2009)

FACTS: On April 14, 2004, Pontiac (Michigan) police saw Jones breaking into parked cars. Jones fled, but "eventually stopped" and when ordered "agreed to lay face down on the ground." He told Officer Miller "that he had previously injured his right shoulder and asked to be picked up by the left arm." However, he claimed, "Officer Miller 'snatched' him up by the right arm," causing his shoulder to dislocate. Officer Miller stated that he "rolled [Jones] to the side and helped him get to one knee," and to get up. Both Officers denied that Jones cried out in pain or that there was an audible "pop" as Jones claimed. Jones spent the night in jail. He complained the next morning to the officer on duty of pain. He was taken to the hospital and treated for a dislocated shoulder. He had surgery the next year on the shoulder. (He did plead guilty to the crime for which he was originally stopped.)

Jones filed suit against the officers under 42 U.S.C. §1983. The claims of excessive force on the part of Garcia was withdrawn. (He attempted to amend his claim to add another against Garcia, but that was denied.) The U.S. District Court gave summary judgment, and Jones appealed.

ISSUE: Is an officer entitled to qualified immunity when a subject alleges (and proves injury) for an excessive use of force?

HOLDING: No

DISCUSSION: The Court began:

> The Fourth Amendment prevents law enforcement from using objectively unreasonable applications of force in the course of making an arrest.[209] The question here is not whether that right is clearly established; all agree that it is. The question is whether Officer Miller violated the prohibition—or at least whether there is a material issue of fact that he did.

[209] See Graham v. Connor, 490 U.S. 386, 388 (1989).

> Viewed in the light most favorable to Jones, the evidence supports a plausible theory of excessive force to present to the jury.

The Court summarized:

> Before Officer Miller's alleged use of excessive force, according to Jones, he had stopped running from the police, had complied with their orders by laying face down on the ground, was handcuffed behind his back and had warned the police of his pre-existing shoulder injury. At that point, Officer Miller had no justification for "snatch[ing]" Jones and hauling him from prone to standing by his injured arm.[210] If allegations of "excessively forceful handcuffing,"[211] create triable issues of fact over excessive force, so does "snatch[ing]" a suspect by his injured arm (and shoulder) and taking him from a prone to standing position in one motion.[212]

The Court noted that this was not a case "where the suspect merely registered subjective complaints of pain."[213] "After the incident, Jones had a dislocated shoulder, which could show that the injury arose from more than the inevitable force needed to make an arrest." The officers countered that a single officer could not have lifted Jones (who weighted 220 pounds) by just the one hard, as only a "superhuman" officer could do so. The Sixth Circuit, however, noted that it would not require the officer to, in effect, dead lift Jones to his feet, but instead would require Miller to maneuver Jones's "torso and upper body, not his whole body."

The officers also claimed that Jones contradicted himself in the original description of the incident, stating:

> I told him I had a bad shoulder; I had an accident a couple of years ago. And besides, you know, rolling me over, you know, in the sitting position and then standing me up, he just snatched me up while I was laying on my stomach, and that's when the injury occurred.

The Court agreed that his first statement was not the "picture of clarity" but that it did not actually contradict his claim. It was, at best, ambiguous. The Court found sufficient cause to allow the case to go forward for further discovery and reversed the decision of the trial court. The Court did, however, affirm the dismissal of Officer Garcia from the case, as the primary allegation, of excessive force, was only against Miller. Jones's tardy attempt to add Garcia under claim was denied.

Hanson v. City of Fairview Park (Ohio), 2009 WL 3351751 (6th Cir. 2009)

FACTS: At about 6:15 p.m., Officer Brewer (Fairview Park, OH, PD) was dispatched to a call of "a male out of control trashing the house." The officer found a vehicle crashed into the house with a car driven through the garage door. He found Hanson there - walking about in an agitated manner and beating on a workbench with two clubs. The officer called out to the subject and Hanson approached him, "walking 'briskly' with two golf clubs in his hands." Officer Brewer said that Hanson raised the clubs and said, "I'm coming for you." Brewer tried to retreat but was trapped by the crashed car. He was unable to retreat further so he shot three times, killing Hanson.

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[210] ROA 62; see McDowell v. Rogers, 863 F.2d 1302, 1307 (6th Cir. 1988) (need for force is "nonexistent" when suspect is handcuffed and "not trying to escape or hurt anyone").

[211] Kostrzewa v. City of Troy, 247 F.3d 633, 641 (6th Cir. 2001) (quotation marks omitted), and twisting a suspect's limb to turn him over, Grawey v. Drury, 567 F.3d 302, 315 (6th Cir. 2009),

[212] Walton v. City of Southfield, 995 F.2d 1331, 1342 (6th Cir. 1993) ("An excessive use of force claim could be premised on [the officer's] handcuffing [the suspect] if he knew that she had an injured arm and if he believed that she posed no threat to him.") superseded by statute on other grounds as recognized in Livermore ex rel. Rohm v. Lubelan, 476 F.3d 397 (6th Cir. 2007).

[213] Lyons v. City of Xenia, 417 F.3d 565 (6th Cir. 2005); Neague v. Cynkar, 258 F.3d 504 (6th Cir. 2001).

Hanson's wife filed suit against the officer and the city. During discovery other witnesses and neighbors, however, questioned whether Hanson had anything in his hands. The trial court ruled that "whether or not Mr. Hanson used golf clubs in threatening Officer Brewer was relevant in analyzing the reasonableness of Officer Brewer's use of deadly force."

Officer Brewer requested summary judgment and was denied. He then appealed.

ISSUE: May disputed facts be addressed in a summary judgment decision?

HOLDING: No

DISCUSSION: The Court noted that "where an order denying qualified immunity turns on a pure question of law, it may be appealed immediately." Further, it stated that the "fact-bound nature of an excessive force claim makes [the] inquiry even more problematic." Each case requires close attention to the "facts and circumstances" and an examination of the totality of the circumstances. In this case, the case resolves on whether Hanson posed a legitimate risk to Officer Brewer. The Court agreed that under Brewer's assertion of the facts the shooting was justified, but under the facts as presented by the other witnesses, it likely was not. With such a disputed set of facts, qualified immunity could not be awarded at this time.

Morrison v. Bd. of Trustees of Green Township, 583 F.3d 394 (6th Cir. 2009)

FACTS: On October 30, 2002, Tika Morrison (Amanda's sister) "called 911 and reported that nineteen-year-old Amanda had a knife and was threatening suicide." Dep. Hopewell (Hamilton County SO) responded and found Amanda sitting outside, alone, in front of a neighbor's home. Amanda told him she'd left her house after an argument with her mother, Cynthia, in which she had stated "I could just kill myself." Officer Celender (Green Township PD) arrived, and went to talk to the family, at Dep. Hopewell's request. He did so and returned to tell Amanda "they would have to take her to the hospital for a psychiatric evaluation, pursuant to Ohio law." At that point, he later stated, Amanda got up and ran toward her home. Amanda, however, later stated that she "announced to the officers that she was going back inside, and simply walked away, thinking the police had finished with her."

At that point, "Officer Celender tackled Amanda from behind and handcuffed her hands behind her back." Her mother emerged from the house and "ran over to where Amanda was lying face down and noticed that the handcuffs were pinching Amanda's skin, causing her skin to turn black and blue." Both Cynthia and Amanda asked the officer to loosen the cuffs and he refused. He later stated he did check the cuffs to make sure they were not too tight. The officer admitted that "Amanda was entirely compliant with his directions while she was handcuffed and that at no point did she attempt to struggle or flee." Amanda did admit to screaming, but said she did so from pain because her ankle was injured when she was tackled. Other officers arrived, as well as Dennis Morrison, Amanda's father. The officers blocked Dennis from going to his daughter. Paramedics treated Amanda's injured ankle. Dennis stated that while "he was calm during the confrontation, the officers testified (in the lower court decision) that he repeatedly charged them in a hostile manner and, thus, was taken down to the ground by the police and placed under arrest." Amanda was taken to the hospital and released later the same day.

Amanda, Cynthia and Dennis Morrison sued all parties involved, under 42 U.S.C. §1983, claiming excessive force and related issues. All defendants moved for summary judgment, and the lower court granted all parties that relief, with the exception of Officer Celender on Amanda's claim of excessive force, in particular with

respect to her claim that "he failed to loosen [the] handcuffs and he repeatedly pushed Amanda's head into the ground after she had been handcuffed and subdued." Celender appealed the denial of qualified immunity.

ISSUE: Is bruising a sufficient injury to prove a use of force excessive?

HOLDING: Yes

DISCUSSION: The Court first reviewed the standard required for qualified immunity, specifically:

> A defendant enjoys qualified immunity on summary judgment unless the facts alleged and the evidence produced, when viewed in the light most favorable to the plaintiff, would permit a reasonable juror to find that: (1) the defendant violated a constitutional right; and (2) the right was clearly established.[214] he Supreme Court recently considered whether to abandon the Saucier two-prong test in Pearson v. Callahan).[215] The Court preserved the test but decided it was no longer mandatory to follow the prongs in order.[216] A right is "clearly established" if "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right."[217] Thus, the relevant inquiry is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."

A Court must review the "subject event in segments when assessing the reasonableness of a police officer's actions."[218] As such, the Court noted that it "must make separate qualified immunity determinations for each of the two grounds offered by Amanda for excessive use of force: (A) Officer Celender's refusal to loosen her handcuffs; and (B) Officer Celender's pushing of her face into the ground while she was handcuffed."

First, the Court looked at the handcuffing, and noted there was precedent for holding that the "Fourth Amendment prohibits unduly tight or excessively forceful handcuffing during the course of a seizure."[219] To prove such a case, the "plaintiff must offer sufficient evidence to create a genuine issue of material fact that: (1) he or she complained the handcuffs were too tight; (2) the officer ignored those complaints; and (3) the plaintiff experienced "some physical injury" resulting from the handcuffing."[220] The Court agreed the first two elements were clearly met. The Court noted that there was evidence, apart from Amanda and Cynthia's statements" that there were marks on her wrist - as the paramedics observed them. The Court disagreed with the officer's contention that bruising and marks were not enough to constitute a "physical injury." The Court agreed that enough evidence was presented to deny qualified immunity on the handcuffing issue and upheld the trial court's decision on that matter. With respect to the pushing, The Court noted that the "use of force after a suspect has been incapacitated or neutralized in excessive as a matter of law."[221]

The Court began:

> First, Officer Celender essentially argues that the government interest in maintaining officer safety outweighed Amanda's interest in avoiding force when he pushed her face into the ground. Notably, Officer Celender does not allege that he engaged in this conduct because

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[214] See Morrison v. Bd. of Trustees of Green Twp.
[215] 129 S.Ct. 808 (2009
[216] Cincinnati, 521 F.3d 555, 559 (6th Cir. 2008) (citing Saucier, 533 U.S. at 201).
[217] Anderson v. Creighton, 483 U.S. 635 (1987).
[218] Phelps v. Coy, 286 F.3d (2002).
[219] Kostrzewa v. City of Troy, 247 F.3d 633 (6th Cir. 2001).
[220] Lyons v. City of Xenia, 417 F.3d 565 (6th Cir. 2005).
[221] Baker v. City of Hamilton, 471 F.3d 601 (6th Cir. 2006).

> Amanda threatened officer safety, as he concedes that Amanda was totally compliant while she was handcuffed and that at no point did she attempt to struggle or flee while restrained.[222] Rather, he claims Amanda's relatives represented the threat due to Amanda's "disorderly and inciteful screaming [, which was] likely to escalate an already tense conflict." However, taking the facts as Amanda asserts them, Amanda screamed out of pain and anguish over the ankle injury she suffered when Officer Celender tackled her, rather than to incite her family to violence against the officers. Moreover, although Officer Celender identifies Dennis, Amanda's father, as a particular source of concern because of Amanda's screaming and offers Dennis' arrest as definitive proof of the volatility of the situation, Dennis flatly denied that he was "excited" when he initially approached the officers. Dennis alleged he was escorted away from Amanda merely because he objected when the officers told Amanda that she did not have a right to speak with the paramedics about her injury. According to Dennis, he "made no aggressive actions" before Deputy Hopewell wrestled him to the ground and handcuffed him. Amanda's testimony buttresses the notion that the police instigated the altercation with Dennis, which resulted in him being taken into custody, as she alleged that Officer Celender reacted without provocation to Dennis' appearance on the scene, exclaiming, "'Shit, it's the father. Get him.'" Cynthia and Tika offer further support, claiming Dennis did not appear "upset" nor was he acting "angry," "belligerent," "aggressively," or "nasty" when confronting the officers.
>
> While Officer Celender also cites a safety concern created by the presence of Cynthia and Tika, the record is completely unsupportive of this contention. None of the witnesses in the proceedings below alleged that Cynthia or Tika threatened the officers or behaved in a hostile manner. To the contrary, the pair maintained they refrained from yelling or screaming at the officers when protesting the officers' treatment of Amanda and complied with police orders to leave the scene after Dennis was taken into custody. Officer Celender himself acknowledged that he was not "concerned" about Cynthia or Tika when Dennis was confronting the officers, as "[t]hey weren't pushing their way in. They weren't trying to hit me or her, anything outrageous. I think they were standing off to the side and protesting what was going on."

As such, the Court found that there was no indication that a "threat to officer safety existed" and summary judgment was not warranted. Although Officer Calender asserted that a requirement for at least a de minimis injury should exist, the Court noted that there was no requirement of injury under this type of claim. Further, the Court noted, "'gratuitous violence' inflicted upon an incapacitated detainee constitutes an excessive use of force, even when the injuries suffered are not substantial."[223] As in Pigram, Amanda argued that "Officer Celender applied force to her head when she posed no threat to officer safety." The Court noted that "such antagonizing and humiliating conduct is unreasonable under the Fourth Amendment, regardless of the existence of injury." Further finding that right to be clearly established, the Court affirmed the denial of summary judgment on the two claims presented by Amanda. (The Court had earlier refused to consider the initial tackling to be excessive force and that issue was not appealed.)

[222] Most of this information comes from depositions taken in the case.
[223] Pigram ex rel. Pigram v. Chaudoin, 199 F. App'x 509 (6th Cir. 2006).

42 U.S.C. §1983 - STATE-CREATED DANGER

Culp v. Rutledge, 2009 WL 2590856 (6th Cir. 2009)

FACTS: On February 1, 2006, at about 7:30 p.m. Collins confronted Jamika when she was attending Bible study in Detroit. They had been involved in a long-distance relationship and had a child, but Jamika broke up with Collins when he became abusive. Witnesses saw Collins grab Jamika and the child and throw them to the ground. Security guards intervened but Collins was able to break free and escape. The police were called and Officers Rutledge and Mason responded. They interviewed witnesses, but were unable to make an arrest because of the minor nature of Jamika's injuries. She made a report of the assault, and later that day she went to the police station to file a formal complaint at Collins for the assault and battery. She was instructed to file her report at another location, because it involved domestic violence.

Jamika and her parents went to the second building and Jamika made a detailed report. The officer also took photos. Sgt. Cooper, the DVU shift supervisor, later stated she recalled getting a phone call from the initial responding officers about the incident, and that they told her that they would be forwarding the report on the incident. She denied, however, that she took a statement from Jamika, but the evidence indicated otherwise. Jamika (and her father) "assert[ed] that the female officer [allegedly Cooper, who fit the description] explicitly told them that Collins would be arrested," and that since they did not see him around the neighborhood after that, they assumed he had, in fact, been arrested. Sgt. Cooper did testify as to the usual process in such cases. As a result of the initial officer's report, an investigator, Lewis, was assigned, and was tasked with contacting Jamika to discuss formal charges. However, because Jamika allegedly never came to the unit, and Lewis was unable to contact her by phone, no formal charges with made and Collins was not arrested. On Feb. 26, Collins returned to the church "armed with a sawed-off shotgun" and sat in the balcony. However Jamika and her father were not present. Her mother, Rosetta, got into a "heated exchange" with Collins and Collins shot and killed her. He later committed suicide. Jamika later testified that Collins's brother had threatened her and her family, and that she had told him she'd filed the report. She stated that her family was concerned, but that they "mistakenly thought that Collins was in jail."

Jamika and her father filed suit against the officers, the Detroit police, and the City claiming under 42 U.S.C. §1983. Eventually everyone was dismissed except Sgt. Cooper, who argued that the Jamika and her father, Culp, could not bring a due process claim on Rosetta's behalf, and that in the alternative, there was insufficient evidence that Cooper "had engaged in actionable affirmative conduct that had placed Plaintiffs at risk to an attack by Collins …." The trial court granted summary judgment to Sgt. Cooper and Jamika and Culp appealed.

ISSUE: Must alleged inaction by law enforcement increase the danger to a victim to be actionable?

HOLDING: Yes

DISCUSSION: The Court reviewed the "state-created danger exception" to the Due Process Clause, which "generally does not provide individuals with an affirmative right to state protection."[224] Following DeShaney, however, the Court had identified two exceptions "whereby state actors have an affirmative duty of care and protection: (1) the 'special relationship' exception, and (2) the state-created danger exception."[225] The latter

[224] DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989)
[225] Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998).

applies "when the state either plays a role in creating a danger to an individual or renders an individual more vulnerable to a pre-existing danger."[226]

Further, the Court continued:

> Under the state-created danger theory, a governmental actor can be held responsible for an injury committed by a private person if:
>
> (1) an affirmative act by the governmental actor either created or increased the risk that the plaintiff would be exposed to the injurious conduct of the private person;
>
> (2) The governmental actor's act especially endangered the plaintiff or a small class of which the plaintiff was a member; and
>
> (3) The governmental actor had the requisite degree of culpability.[227]

Jamika and Culp argued that Sgt. Cooper is liable "created a dangerous situation when she told the Williams family that the police would arrest Collins but did not follow through with the arrest." The danger was increased because Jamika told Collins' brother about the complaint, increasing Collins's anger at Jamika and her family, and that they only returned to the church because they believed Collins was in jail. The trial court, however, found that there was no evidence that the "alleged inaction" increased the danger, since Sgt. Cooper did not encourage them to return to the church, and that the "causal link to the attack [was] attenuated because Collins could have attacked [them] at any time." Further, since he was employed, he would likely have been able to post bond and be out of jail. Further, "any failure by Sergeant Cooper to follow up on Jamika's domestic violence claim constitutes *inaction* which does not qualify as an affirmative act under a state-created danger theory."

Finding that the action was unsupported because it failed under the first prong, the Court did not have to go further, but did also state that the action failed under the second and third prongs, as well. There was no evidence that Cooper should have realized that a failure to arrest Collins would post a specific risk to Rosetta, or that she should have "forseen that the entire Williams family could be injured by her failure to effectuate an arrest warrant for Collins …."

The trial court's decision was affirmed.

42 U.S.C. §1983 - BRADY

Moldowan v. City of Warren, 578 F.3d 351 (6th Cir. 2009)

FACTS: Moldowan was originally convicted in the 1990 abduction and sexual assault of Fournier, but his conviction was reversed in 2002 after new evidence came to light. He was acquitted on retrial and then filed suit against numerous parties, including the Warren Police Department and several officers. He alleged the parties, both acting together and separately, violated his rights by fabricating evidence and failing to disclose exculpatory evidence.

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[226] Jones v. Union County, Tennessee, 296 F.3d 417 (6th Cir. 2002)

[227] Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Ed., 542 F.3d 529 (6th Cir. 2008); McQueen v. Beecher Cmty Schs., 433 F.3d 460 (6th Cir. 2006); Ewolski v. City of Brunswick, 287 F.3d 492 (6h Cir. 2002).

Some of the relevant facts of the underlying investigation include the following. Following her abduction and brutal assault, Fournier reported that she had been taken by four males that she knew, including Moldowan, her ex-boyfriend. Eventually, all four were arrested, but charges against one were dropped when he had a solid alibi. Fournier testified at a preliminary hearing, as did her sister Corcoran. Two of the three remaining men, Moldowan and Michael Cristini, were bound over for trial. At trial, the two offered essentially the same testimony. Another witness, Dr. Warnick, a forensic odontolgist, testified that bite marks on her body were consistent with the two men, as well. Both men offered alibi witnesses and competing expert testimony. Both men were convicted, however.

After the conviction, a private investigator uncovered a witness that suggested other individuals committed the crime. Further, a dentist-witness that had supported the prosecution came forward to state that she'd been deceived and had actually been unsure of her findings. As a result of this evidence, Moldowan was granted a new trial, at which time he was acquitted. Following a complex procedural history, the trial granted summary judgment in favor of one officer, but denied it to all of the other parties. Multiple appeals (on behalf of the various defendants) ensued.

ISSUE: Does law enforcement have a responsibility under Brady to disclose exculpatory material?

HOLDING: Yes

DISCUSSION: The Court first declined to grant qualified immunity to the officer-defendants, finding factual disputes that could not be resolved at this point. However, Det. Ingles (and two other non-officer parties) also requested "absolute testimonial or witness immunity." Although the Court agreed normally that type of claim would not be reviewed in an interlocutory proceeding, that because these claims, in this case, are similar to those raised by public official qualified immunity, it would do so. The Court noted: "exposing police offices and forensic investigators to suit based on testimony they deliver as part of their official duties and on behalf of the state undoubtedly implicates their ability to exercise their discretion and potentially inhibits them from performing their duties."

With respect to Det. Ingles, Moldowan contended that "Ingles was required to disclose exculpatory statements" from a witness that suggested that others had committed the crime.[228] The Court agreed that the responsibility to reveal such evidence "falls squarely on the prosecutor, not the police."[229] However, it continued, this "well-established rule … does not resolve whether the police have a concomitant or derivative duty under the constitution to turn potentially exculpatory material over to the prosecutor." Moldowan argued that if that was not the case, "then the state could sidestep its constitutionally-mandated disclosure obligations by maintaining an unstated, but nevertheless pervasive, wall of separation between the prosecutor's office and the police with regard to the existence of potentially exculpatory evidence."

The Court noted that it has recognized that the police have an active role in any prosecution, and are "treated as an arm of the prosecution for Brady purposes." As such, "the police inflict the same constitutional injury when they hide, conceal, destroy, withhold, or even fail to disclose material exculpatory information." In Arizona v. Youngblood, the Court had confirmed that the police have at least a limited obligation to preserve evidence that might exonerate the defendant."[230] Although the Court agreed that police cannot necessarily know if particular evidence was material, in the legal sense, the Court agreed that "there is no doubt that the

[228] Brady v. Maryland, 373 U.S. 83 (1963); see also California v. Trombetta, 467 U.S. 479 (1984).
[229] Giglio v. U.S., 405 U.S. 150 (1972); Lindsay v. Bogle, 92 F.App'x 165 (6th Cir. 2004); Kyles v. Whitley, 514 U.S. 419 (1995).
[230] 488 U.S. 51 (1988)

police are just as capable of depriving criminal defendants of a fundamentally fair trial by suppressing exculpatory evidence."

The Court agreed that the right to disclose such evidence was clearly established such that Det. Ingles should have been well aware of it. The Court then considered whether, in this instance, the character of the evidence was such that the parties should have recognized its potential exculpatory nature. (The Court noted that even an "inadvertent nondisclosure" has a critical impact on the case, so that the mental state of the actor was no the determining factor.) In Illinois v. Fisher, the Court explained that the "applicability of the bad-faith requirement in Youngblood depended … upon the distinction between 'materially exculpatory' evidence and 'potentially useful' evidence."[231] The Court stated that "simply put, where the evidence withheld or destroyed by the police falls into that more serious category [materially exculpatory], the defendant is not required to make any further showing regarding the mental state of the police."[232]

The Court stated:

> Where the exculpatory value of a piece of evidence is "apparent," the police have an unwavering constitutional duty to preserve and ultimately disclose that evidence. The failure to fulfill that obligation constitutes a due process violation, regardless of the [sic] whether a criminal defendant or a §1983 plaintiff can show that the evidence was destroyed or concealed in "bad faith."

The Court found no direct evidence that Det. Ingles "acted intentionally in withholding these exculpatory statements," but noted that it was certainly enough to survive summary judgment at this stage.

In another issue, Moldowan alleged that Office Schultz destroyed evidence introduced at the first trial, in contravention of the trial court's order that all evidence be preserved. The officer was fulfilling an "entirely ministerial task of sending out annual inquiries to the detectives in charge of each case, asking whether the detective wanted the evidence being held in the property room, 'held, destroyed or released.'" Apparently Ingles authorized its destruction. The Court found no bad faith on the part of Schultz and granted him summary judgment.

The Court affirmed the denial of summary judgment in favor of Det. Ingles with respect to the Brady claims.

42 U.S.C. §1983 - FAILURE TO TRAIN

Howard v. City of Girard, Ohio and John Does 1-4, 2009 WL 2998216 (6th Cir. 2009)

FACTS: Howard, then 17, called 911 because he could not contact his father for several days. He shared an apartment with his father but could not gain access and had slept in the hallway. Emergency personnel forced entry into the apartment, but did not keep Howard out. His father was found lying naked, with a self-inflicted gunshot wound. An emergency crew transported his father who died at the hospital.

Howard sued the city and the emergency responders (for whom he did not have names) under 42 U.S.C. §1983 "for failing to limit Howard's access to the apartment until the crew first surveyed the interior of the apartment." He claimed that their actions caused his "severe psychic injury." He also claimed the city failed to

[231] Illinois v. Fisher, 540 U.S. 544 (2004).
[232] Wright, 260 F.3d

train its employees properly. The Court dismissed the federal action and refused to exercise jurisdiction over the state claims of negligence.

Howard appealed.

ISSUE: Is permitting a relative to view the body of a subject improper?

HOLDING: No

DISCUSSION: First, the Court noted:

> To prevail on a claim against the city under §1983, plaintiff must establish both: (1) the deprivation of a constitutional right, and (2) the city's responsibility for that violation. Or, in the words of the district court, "[f]or a municipality to be held liable for a constitutional violation, a plaintiff must show an actual constitutional violation for which the municipality is responsible.

The Court noted that the Due Process Clause of the Fourteenth Amendment "does not generally require a municipality to protect an individual from harm by third parties."[233]

However:

> There is an exception, however, for "state-created danger." We have held that the "statecreated-danger theory of due process liability" has three requirements: (1) an affirmative act by the state that creates or increases the risk that an individual will be exposed to private acts of violence, (2) a special danger to the victim as opposed to the public at large, and (3) the requisite degree of state culpability.[234] Although they raised several arguments below, plaintiff's sole argument on appeal relates to the district court's analysis of the third McQueen prong.3 The district court held that defendants could not be held liable unless they acted with "deliberate indifference," meaning in this context that "[t]he state must have known or clearly should have known that its actions specifically endangered an individual."[235] The district court concluded that plaintiff failed to allege sufficient facts to support his amended complaint because he did not allege that Girard, or its employees, acted with anything but recklessness.

The Court found that Howard did not meet the standard for a federal case and affirmed the federal court's decision. (This leaves open the possibility of further state action for negligence, however.)

42 U.S.C. §1983 - SHERIFF

Dever v. Kelley, 2009 WL 2998216 (6th Circ. 2009)

FACTS: After several years of negotiation and sharing control of a company (APC) with Clark, the owners (the Devers) "decided to take control of APC away from Clark." "Fred (Clark) called the sheriff's office for assistance in removing Clark, but the deputies declined to intervene absent a court order." Dever then changed the locks, which kept Clark out. When Clark persisted in returning, an employee called the Sheriff's office. The deputies excluded him from the premises. Litigation between the Devers and Clark ensued. The

[233] See DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).
[234] McQueen v. Beecher Cmty. Sch., 433 F.3d 460, 464 (6th Cir. 2006).
[235] Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998).

Court issued a preliminary order, finding a reasonable probability that Clark would be successful in forcing the sale in further litigation. Clark was required to post a bond, but was given control over the company.

The next morning, on December 13, at 5:30 a.m., "Clark called the … Sheriff's Office for assistance enforcing the preliminary injunction." Deputies met Clark and they proceeded to APC. Dever was already present. The deputies knocked and Dever unlocked and opened the door. Dep. Reed "'threw' a copy of the preliminary injunction on Fred's desk and stated that it gave possession of APC to Clark." Dever replied that he (and his wife) had "filed a motion for a stay and an appeal, both of which were pending." The deputies refused to look at the paperwork to that effect, and refused to speak to Dever's attorney on the phone. One of the deputies later admitted he probably told Dever to get his belongings and get out (in slightly less polite terms). Clark disputed that some of the items did, in fact, belong to Dever, and Dever was ordered to leave the items. Dever left under escort. A stay was ordered on December 22, and Dever sought the assistance of the sheriff to enforce the order, but the sheriff's office refused to become involved. Clark filed for bankruptcy on the part of APC, and that "stayed the stay." After further litigation, the Dever's finally regained control some six weeks later but by that time little remained of the business.

On Dec. 12, 2006, the Devers filed suit against Clark and Sheriff Kelly (along with the deputies directly involved). The Sheriff moved for summary judgment, which was granted. The Devers appealed.

ISSUE: May law enforcement officers refuse to uphold a valid order?

HOLDING: No

DISCUSSION: The Court began by noting that the Devers had to prove that the Sheriff and his deputies acted under color of law and that their conduct "deprived them of rights secured by federal law." The parties stipulated to the first, leaving only the second prong for discussion. The Court stated that although the issues were "hotly contested," that on the date in question, the preliminary injunction was still in effect. Dever's presence on the property was unlawful on that date. If they believed the order was improper, their recourse was to appeal it, not disobey it. As such, Dever had no expectation of privacy to be violated that morning, so "'no search' occurred within the meaning of the Fourth Amendment and the Devers have not presented evidence from which a rational trier of fact could find a violation of their right to be free from an unreasonable search."

The Court upheld the summary judgment in favor of the Sheriff.

INTERROGATION

Fleming v. Metrish, 556 F.3d 520 (6th Cir. 2009)

FACTS: In 1999, York was found murdered in woods in Michigan. He had been shot twice. The following month, Fleming was identified as a suspect to Det. Lesneski, and he agreed to speak to the officer. Fleming stated that he knew the victim and had picked him up as a hitchhiker and dropped him off near the murder site. The police obtained a search warrant for Fleming's home and farm buildings. Fleming was cooperative and showed the officer where illegal drugs would be found. Det. Lesneski gave Fleming his rights and asked if Fleming would speak to him, but Fleming adamantly refused. Fleming was arrested for the drugs and secured in a cruiser. The search of the property continued. About an hour later, Fleming was removed to another vehicle, where he would sit with Officer Clayton for about two hours. Fleming and the officer "engaged in small talk," until Lesneski returned, smiling. The police had found the murder weapon.

Officer Clayton told Fleming "that things did not look good for him and that 'maybe he needed to do the right thing.'" (There was dispute as to the actual words.) A few minutes later, Clayton asked Fleming if he wanted to speak with Det. Lesneski and he agreed to do so. Det. Lesneski stated that when he entered the van, "Fleming began to weep." Lesneski moved the van, so that other could not see Fleming crying. After a few minutes to "get his head straight," Fleming confessed. He asked if the police had found the gun and Lesneski agreed that they had. Det. Lesneski later stated that "he let Fleming speak without interruption until he was finished." He gave Fleming his Miranda rights and questioned Fleming further about the murder. An hour later, he repeated his confession and it was recorded at the police station, after he received Miranda a third time.

Fleming was indicted and requested suppression. The Court denied the motion, and Fleming stood trial. At trial, Fleming denied he had specifically confessed in the van. He also argued that he had killed York in self-defense. After conviction, he appealed. After exhausting his state court remedies, he sought federal habeas. The District Court ruled that Fleming's right to silence was violated. He then appealed.

ISSUE: May statements made after an invocation to remain silent be admitted?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court reviewed whether Fleming was interrogated by Officer Clayton as they say in the van. Looking to Rhode Island v. Innis, the Court defined interrogation as not just "express questioning, but also … any words or actions on the part of the police (other that those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[236] The Court noted that Officer Clayton's brief admonitions did not rise to the level of interrogation.

Next, the Court looked to whether statements will be admissible when made "after the person in custody has decided to remain silent depends under Miranda on whether his 'right to cut off questioning' was 'scrupulously honored.'"[237] The Court elaborated by nothing that the police could violate this by "refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." Factors favoring a finding that the police have scrupulously honored a defendant's rights include where "[1] the police … immediately ceased the interrogation, resumed questioning only after [2] the passage of a significant period of time and the provision of a fresh sense of warnings, and [3] restricted the second interrogation to a crime that had not been a subject of the earlier interrogation." The District Court "did not think that the police waited long enough before 'questioning' Fleming a second time about the murder," and noted that "Fleming did not receive fresh Miranda warnings before Clayton made his comment." In addition, the interrogation was on the same crime that was the subject of the previous interrogation. The Court concluded that Fleming's statements were not taken in violation of Mosley. The police were permitted "to present new information to a suspect so that he is able 'to make informed and intelligent assessments of [his] interests.'"

The Court reversed the District Court's decision and remanded the case with instructions to deny Fleming's petition.

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[236] 446 U.S. 291 (1980).
[237] Michigan v. Mosley, 423 U.S. 96 (1975).

Raedeke v. Trombley, 2009 WL 751096 (6th Cir. 2009)

FACTS: Raedeke was arrested by Officer Van Keuren (Flint, MI, PD). When he was asked by the officer if he knew why he was being arrested, he nodded his head yes and said "but I was doping and drinking when I did it." He was eventually convicted and appealed.

ISSUE: Is the response to a statement by an officer not intended to get an incriminating response admissible?

HOLDING: Yes

DISCUSSION: Raedeke argued that his statement upon arrest should not have been admitted, because he had not yet been given Miranda when the officer asked if he knew why he was under arrest. The trial judge, however, had concluded that the officer made a statement, rather than a question, to the effect of "you know what you are under arrest for." The Court agreed that "Van Keuren's remark was not designed to elicit a response from Raedeke."

Raedeke's conviction was affirmed.

Garner v. Mitchell, 557 F.3d 257 (6th Cir. 2009)

FACTS: Garner was convicted of five counts of murder, during the course of a burglary and arson. He appealed.

ISSUE: Is a person of apparently near-average background competent to waive Miranda rights?

HOLDING: Yes

DISCUSSION: Garner argued that his waiver of Miranda rights was improper because he was unable to understand the consequences of waiving those rights. The Court noted that the "police officers took care to ensure that Garner understood the warnings and waiver before he signed the form." The Court noted that "Garner had the capacity to understand the criminal nature of his actions and the consequences of his actions." (Garner started the fire to cover up evidence of the burglary, believing that he may have left fingerprints that would lead to his arrest.) The Court further noted that "Garner appeared 'perfectly normal' and 'very coherent' to the interrogating officers," and, in a competency report, the psychologist "stated that Garner 'appeared to be of near average intelligence by observation,' 'appeared to be able to understand all questions and material presented to him,' and that 'his expressive language abilities were intact.'" As such, the Court stated, "even if Garner's mental capacity [IQ of 76], background [troubled upbringing], age [19] and experience [poor education] did somehow prevent him from actually understanding the Miranda warnings – and the evidence indicates that they did not – the officers questioning Garner had no way to discern the misunderstanding in Garner's mind."

The Court agreed that officers are not free to "disregard signs or even hints that an interrogation suspect does not understand" warnings, however. In this case, the Court reviewed the various reports (and the tests upon which the reports were based) of psychologists who examined Garner. Although "mental capacity is one of many factors to be considered" in determining whether a Miranda waiver is valid, "that factor must be viewed alongside other factors, including evidence of the defendant's conduct during, and leading up to, the interrogation." "Garner's conduct, speech, and appearance at the time of interrogation indicated that his waiver was knowing and intelligent, notwithstanding his diminished mental capacity." The Court observed that

"at no time did Garner exhibit any outwardly observable indications that he did not understand the warnings or the circumstances surround his interrogation."

Garner's conviction was affirmed.

U.S. v. Panak, 552 F.3d 462 (6th Cir. 2009)

FACTS: In 2006, DEA investigators visited Panak's home, doing an investigation of her dentist employer's illegal use and distribution of hydrocodone. At the end of the interview, which lasted less than an hour, they "thanked [her], left her house and did not contact her again for some time." Over a year later, she was indicted for her involvement in the crime. She moved for suppression, and the District Court granted her motion. The United States appealed.

ISSUE: Is an interview that occurs at home custodial?

HOLDING: No (barring additional circumstances)

DISCUSSION: The U.S. argued that at the time of the interview, Panak was not in custody. The court reviewed the facts, and agreed that the interview "did not rise to the level of a custodial interrogation," since it took place in her home. Even accepting that Panak may have already been a suspect at the time, the concerns that triggered the Miranda decision were simply not implicated in an interrogation of this nature, at a person's home. The Court agreed that if, for example, the individual was handcuffed at home, it would be custodial, and that the "number of officers, the show of authority, the conspicuous display of drawn weapons, the nature of the questioning all may transform one's castle into an interrogation cell," are all also factors that could serve to do so.

"This interrogation, however, did not cross that line and retained a non-custodial hue throughout." Although she knew her employer was in trouble, she was never threatened with arrest, "never told … that she was in trouble, never told … that she was a suspect and never told .. that she was potentially subject to criminal penalties." She even answered follow-up questions a few months later, by telephone. The Court agreed that she was never told that she "need not answer their questions or could end the interview at will," but the Court did not find that dispositive. Panak argued that she never "invited" the investigators in, but only "let" them in, but the court found that they "plainly did not force their way in against her wishes but entered only after she allowed them to do so." The Court also stated that while "Panak may well have felt some internal pressures to answer the investigators' questions," that the "question in the end is not whether the individual felt pressure to *speak* to the officers but whether she was forced to *stay* with them."

Since the Court found that was not the case, the District Court's decision was reversed, and the case remanded for further proceedings.

U.S. v. Kellogg, 306 Fed.Appx. 916 (6th Cir. 2009)

FACTS: The U.S. Marshals were seeking Kellogg on an arrest warrant. They located Kellogg and took him into custody. Kellogg gave consent to a search of the apartment where he was staying, and told them where drugs and a gun would be found. When he was asked whether the money from a specific bank robbery was in the apartment, "Kellog responded that the drawer was not in the residence because" he had already gotten rid of it. They did recover a number of items related to that robbery, however.

Kellogg was taken to the Chattanooga FBI office, and at some point, signed a waiver of his Miranda rights. Kellogg was indicted on drug trafficking charges and moved for suppression. He argued that he was on Xanax when he gave the consent and therefore was not "in my right frame of mind to waive my rights" at the time. The trial court denied his motion.

ISSUE: Is asking consent to search an interrogation?

HOLDING: No

DISCUSSION: First, Kellogg argued that since he claimed to be under the influence of Xanax, that his consent was invalid. The Court, however, found that the evidence was that he was "coherent and appropriately responsive" and that as such, he was not coerced. Kellogg also argued that because he was not given his Miranda warnings "prior to asking for his consent to search," that anything found had to be suppressed. The Court found that asking to search is not an interrogation under the law, because that request is not "likely to elicit an incriminating response." The questions about the location of the gun and the money, however, were likely to do so, and the Court noted that it was not clear as to whether he'd been given his Miranda warnings prior to that question being asked. The Government, however, had claimed that the question was proper under the "public safety exception" to Miranda.[238] The Court ruled that the situation was not sufficient to prove there was any immediate danger from the presence of the gun in the apartment. Further, the questioning concerning the money was clearly improper,.

Kellogg also argued that the in-court identification of him, as the robbery, was improper because it was not done in response to a question by the prosecutor. The Court, however, found it sufficiently reliable to be presented to a jury, which could then make a credibility determination on its own.[239]

The Court reversed the case, however, because of the admission of his responses to the statements concerning the drugs in his apartment.

U.S. v. Hunter, 2009 WL 1617886 (6th Cir. 2009)

FACTS: On Jan. 1, 2006, Cincinnati officer responded to a "shots fired" call. They received a description of the shooter and Sgt. Frazier saw Hunter, who met the description standing next to a vehicle that also matched the description given. He watched Hunter place something in the car and then walk away. He also saw 20-30 other people, many running, in the area. Officer Finley seized and handcuffed Hunter, gave him Miranda warnings and placed him in a police car. Looking into the car, Sgt. Frazier saw an AK-47, which Hunter denied was his. They also recovered a revolver, a shotgun and apparently a second AK-47 from the grass, and found shell casing from various weapons. Buck (Hunter's girlfriend) was in the vehicle; she was also arrested. Officer Finley told her that she might be charged with a federal offense for the AK-47, although in fact, no federal charges were warranted under the situation. (The weapon was apparently a legal semi-automatic and Buck was not a convicted felon.) The pair were transported separately, but questioned in the same room. Sgt. Frazier reiterated the threat of federal charges. He also told Hunter his hands would be tested for gunshot residue and asked him if he'd used fireworks as that would affect the test. Hunter agreed that he had used fireworks earlier that day, whereupon Frazier told him the test could differentiate between the two. After the test, Hunter asked to speak to Frazier and told him that he didn't want Buck to go to jail and that

[238] Quarles
[239] See Neil v. Biggers, 409 U.S. 188 (1972)

he'd fired the weapon. He stated he'd bought the weapon earlier the day and had placed black tape upon it for decoration.

Hunter was indicted for being a felon in possession of a firearm. He moved for suppression, and was denied. Hunter took a conditional guilty plea, and appealed.

ISSUE: Is a threat against a third party enough to cause a confession to be coerced?

HOLDING: No

DISCUSSION: Hunter argued that his confession was coerced by the threat to his girlfriend. The Court agreed that a "credible threat" was sufficient to make a confession coerced, either to the suspect or a third party.[240] The Court looked to the three requirements in U.S. v. Mahan: 1) the police activity was objectively coercive; 2) the coercion in question was sufficient to overbear the defendant's will; and 3) the alleged police misconduct was the crucial motivating factor in the defendant's decision to offer the statement."[241] In this case, the Court found that none of the prongs were met. The Court agreed that the officers may have legitimately believed that they could charge Buck, as it was noted that a semi-automatic weapon (legal) cannot be readily distinguished by observation from an automatic weapon (illegal without a federal permit). The Court further agreed that although Hunter was mildly mentally retarded, he had experience in the criminal justice system and that the residue test affected his decision more than the threat to his girlfriend.

The Court found Hunter's confession to be voluntary, and upheld the plea.

Zagorski v. Bell, 326 Fed.Appx. 336 (6th Cir. 2009)

FACTS: Zagorski was indicted for the murders of Dotson and Porter. He was convicted and received the death penalty. Tennessee affirmed his convictions and sentence, and he sought post-conviction relief in the federal courts. The District Court refused his petition and he appealed.

ISSUE: If a subject requests to speak to an officer, on their own initiative, is that sufficient to waive his rights to silence and to counsel?

HOLDING: Yes

DISCUSSION: Among other issues, Zagorski claimed that the police took statements from him after the invoked his rights to counsel and to silence. The Court noted that after he invoked, that he sent notes to Det. Perry, who returned to the jail to speak to him, but Zagorski alleged that his statements (which were a confession) were "inadmissible because they resulted from 'coercive police activity.'"[242] He claimed that he had "been incarcerated under oppressive conditions, kept in isolation, and deprived of exercise or sunlight." The Sheriff, however, indicated that he had attempted to escape and had attempted to commit suicide, and the additional security was because of that. The Court noted that "Zagorski requested to speak with Detective Perry on his own initiative and insisted on confessing even though the detective advised him to speak with his lawyer first.."

[240] Arizona v. Fulminante, 499 U.S. 279 (1991); U.S. v. Finch, 998 F.3d 416 (6th Cir. 1999); U.S. v. Johnson, 351 F.3d 254 (6th Cir. 2003).
[241] 190 F.3d 416 (6th Cir. 1999).
[242] Jackson v. McKee, 525 F.3d 430 (

Further, the Court stated:

> An accused, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."[243] But the accused's statement may be admitted nevertheless if an Edwards initiation occurs; that is, the statement is admissible "when, without influence by the authorities, the suspect shows a willingness and a desire to talk generally about his case."[244] Zagorski did not just express a voluntary willingness "to talk generally about his case"—he insisted on giving Detective Perry specific details. As a result, the state court decision was neither contrary to, nor involved an unreasonable application of clearly established Federal law.

The Court ruled the statements admissible, and upheld the denial of his write of habeas corpus.

U.S. v. Clay, 320 Fed.Appx. 384 (6th Cir. 2009)

FACTS: Clay, a Tennessee prison officer, brought a gun in the facility where she worked (Bass Correctional Complex) and attempted to pass it to an inmate in a jar of peanut butter. The inmate who discovered the ruse reported the attempt to another correctional officer and turned over the weapon, which was traced back to Clay. Clay was questioned, and when she said she wanted a lawyer the interview stopped. She reinitiated the conversation a little later and eventually, she admitted to bringing the gun in for an inmate.

Clay was charged, convicted, and appealed.

ISSUE: Is an interview at a workplace coercive?

HOLDING: No

DISCUSSION: Clay argued that her statements should have been suppressed because "(1) the investigators unlawfully detained her, (2) they unlawfully interviewed her after she invoked her right to counsel, and (3) she involuntarily waived her Miranda rights." The Court agreed that at the time she admitted owning the gun, the "encounter was only an investigatory interview, not an arrest." Further, "There was no evidence of coercion, and the questioning had only been taking place for a short time in the relatively non-threatening environment of a conference room at Clay's workplace. The scope and nature of the interview was entirely reasonable given that a gun had been found in the prison in an area where Clay had worked." The Court noted that "Because the encounter was still an investigatory Terry stop when Clay provided additional incriminating statements giving rise to probable cause, any subsequent arrest that may have occurred was lawful."

> The Court further agreed that her request to "talk to them again," opened her up to further questioning, and in fact, she was specifically asked if she wanted to reinitiate the interview. The Court agreed that she "knowingly and intelligently waived her rights," and that there was no coercion. The Court agreed that a statement that her fingerprints were found in connection to the gun was false, but held that simply leading a suspect to believe such information was not coercive.

[243] Edwards v. Arizona, 451 U.S. 477 (1981)
[244] United States v. Whaley, 13 F.3d 963 (6th Cir. 1994).

Clay's conviction was affirmed.

Beach v. Moore, 2009 WL 2487357 (6th Cir. 2009)

FACTS: Beach was charged in the death of Buck, whose body was discovered hidden on December 26, 1999, in Toledo. Following the murder, the police talked to Beach four times, "each time [Beach was] making statements that increasingly showed his involvement in the events surrounding the murder." Two interviews were held with his attorney present, but with specific statements that Beach was not under arrest and was speaking voluntarily. Prior to a third interview, his attorney had arranged for a deal that depended upon Beach being successful in a polygraph, but he was not. As a result, he was offered a deal if he pled guilty to involuntary manslaughter.

Beach tried to enforce the earlier anticipated deal, but the court refused. He was tried and the statements made at the two earlier interviews was admitted. He was convicted of aggravated murder. He appealed through the Ohio courts and was denied. He sought habeas from the federal courts and was denied. He was permitted to appeal.

ISSUE: Is a statement in response to a plea deal offer voluntary?

HOLDING: Yes

DISCUSSION: After ruling on several procedural issues, the Court addressed Beach's argument that his statements were involuntary. The Court reviewed the circumstances, and his assertion that he was promised a plea deal. However, there was no indication that his "will was overborne," and in fact, his own attorney admitted the plea negotiations were not opened until after the two statements were made.

The Court upheld the admission of the two statements and affirmed the conviction.

Young v. Renico, 2009 WL 2707379 (6th Cir. 2009)

FACTS: On February 8, 1997, Detroit police responded to a possible shooting in a city park. They found a vehicle with a flat tire and various tools arranged to change the tire. They found the driver, Young and her 15 year old son, Michael, with gunshot wounds to the head. Young was dead and Michael unconscious. A purse in the car contained $300 in cash.

The investigation led Det. Lovier to the victim's husband, Ardra. He came to the homicide office on his own, and signed a Miranda form, acknowledged his rights. Young and Det. Smith sat in the open squad room, with other detectives working nearby. Young first gave an exculpatory statement that indicated he'd been elsewhere in the state. He acknowledged having handguns, and stated he was presently carrying one. He handed the weapon to Lovier upon request, who secured it in a desk drawer. Smith and Lovier conferred. Smith called the hospital, and learned that Michael had been taken off life support at the request of his father and had died. When confronted, Young confessed in detail. He provided information as to where the murder weapon had been hidden in the house, and later forensic testing confirmed that it was, in fact, the murder weapon.

Young was convicted and appealed. The Michigan state courts denied his appeal, and he took a federal habeas corpus petition. The U.S. District Court denied the petition, and Young further appealed.

ISSUE: Is a person who arrives voluntarily to give a statement seized?

HOLDING: No

DISCUSSION: Young argued that "his confession was the fruit of an illegal seizure." He contended "that the officers kept him in the homicide section squad room without probable cause and that they exploited this unconstitutional detention to gather more evidence against him, which prompted his confession."

The Court countered:

> Young contends that he was in the custody of the homicide detectives once he reported to the office and was advised of his Miranda rights. While we have held that an officer's recitation of Miranda warnings provides some "evidence that the nature of the detention has grown more serious," we have been careful to note that the giving of such warnings does not automatically signal the beginning of a custodial arrest.[245] This is so because the fundamental inquiry remains whether a reasonable person would have felt free to end the encounter with the police and go on his way. In conducting this inquiry, we should consider the fact that Detective Smith issued Miranda warnings to Young as soon as he entered the station, but we should also analyze the other circumstances surrounding the interrogation.

The Court noted that Young had spoken to an officer at about 4:30 a.m. and agreed to come to the homicide office. He chose the time of his arrival (about noon). He was not threatened in any way. Although he was given Miranda warnings, he was not handcuffed or restrained, and was questioned in the middle of an open office area. The Court agreed that the reading of Miranda "did not transform his voluntary arrival at the police station into a custodial arrest."

Young also argued that he was seized when the officers "confiscated his handgun, which he possessed under a valid concealed-carry permit." The Court noted, however, that he was not told that the officers were going to keep the gun as evidence or not return it to him when he left. Even though Det. Smith later testified that he planned to keep the gun and test it, and that it was not the usual policy to seize a lawfully-owned weapon, that was not the issue. All that mattered was Young's perception, "not what the officers' subjective intentions were."[246] "Finally, Young contends (and we agree) that he was in custody once Detective Smith told him that he "would not walk out of there" because his initial statement was "bullshit." But, the Court agreed, at that point the officers had sufficient probably cause to detain Young, anyway.

The Court affirmed Young's conviction.

SUSPECT IDENTIFICATION

Mills v. Cason (Warden), 572 F.3d 246 (6th Cir. 2009)

FACTS: Mills (along with two other men) were accused of attacking four women during a robbery. When they were unable to get any money in the robbery, the men "went on a rampage, repeatedly beating and kicking the women and striking them with guns." They also "cut up" the women and one of the men committed rape. They then set the building on fire. Two of the women got out but the remaining two died of smoke inhalation and multiple traumatic injuries. When interviewed, neither of the survivors could provide a

[245] Obasa, 15 F.3d at 608; see also State v. Damon, 570 A.2d 700, 705-06 (Conn. 1990) ("[T]he issuance of Miranda warnings as a cautionary measure does not mean that the defendant had been arrested.").
[246] U.S. v. Mendenhall, 446 U.S. 544 (1980)

description. One was shown six photos and eliminated three, but could not select a suspect from the remaining three. (Mills's photo was one of those three.) At trial, however, she did identify Mills over his objections.

Mills was convicted and appealed. After exhausting his appeals in the state courts, he filed for habeas relief. The U.S. District Court ruled in the state's favor and Mills further appealed.

ISSUE: May a pretrial identification be introduced at trial?

HOLDING: Yes

DISCUSSION: Mills argued that the "introduction at trial of a pretrial identification [was] so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[247] To determine if the later identification was tainted the court followed a two step evaluation. First, the Court had to determine if the procedure was unduly suggestive. If so, the Court looked to Neil v. Biggers[248] to decided it was, nonetheless, reliable.[249] This process was followed by the trial court, with further weight given to the totality of the circumstances to decide the matter.[250]

The Court agreed that the trial court's decision was properly substantiated, and affirmed Mills' conviction.

TRIAL PROCEDURE / EVIDENCE

U.S. v. Johnson, 581 F.3d 320 (6th Cir. 2009)

FACTS Several years after a 2001 bank robbery that resulted in the death of a guard, the FBI received a tip that O'Reilly had been bragging about being involved. The tipster, Nix-Bey agreed to take notes on further conversations, and was told to be a "good, active listener." He agreed some time later to use a recording device, and it was arranged that the two be in the same cell. The listening device was disguised in a radio. O'Reilly provided extensive information, including the names of others involved. The FBI agent engaged the cooperation of those individuals as well, and they named another party, Johnson, and stated he had recruited them into the conspiracy. Johnson was arrested in 2004.

At trial, the two informants who had pled guilty testified as to Johnson's involvement. The tape recording from Nix-Bey, who did testify as well, was also admitted. Johnson was convicted, and appealed.

ISSUE: Is evidence told to a third-party informant admissible?

HOLDING: Yes

DISCUSSION: First, the court addressed the admissibility of the tape recording. The Court agreed that O'Reilly's statements on the tape were not testimonial, because, of course, he did not know the statements would be used in a criminal proceeding against a third party. As such, Crawford[251] did not apply. The Court agreed that even if Bruton[252] would normally apply, that the Bruton rule is to guard against the risks of a joint

[247] Thigpen v. Cory, 804 F.2d 893 (6th Cir. 1986)
[248] 409 U.S. 188 (1972)
[249] Ledbetter v. Edwards, 35 F.3d 1062 (6th Cir. 1994).
[250] Manson v. Braithwaite, 432 U.S. 98 (1977)
[251] Supra.
[252] Supra.

trial, and the two men were not tried together. Further, it was admissible under the Federal Rules of Evidence, as a "statement against penal interest," as set forth in Rule 804(b)(3). The context of the statement was such that they were considered to be trustworthy.

After resolving several other issues, Johnson's conviction was affirmed.

U.S. v. Pike, 2009 WL 2514070 (6th Cir. 2009)

FACTS: In December, 2006, Officer Gabrielson (Ohio Organized Crime Investigations Commission) met Pike and Pennington. He saw them again two months later. During that time frame, Gabrielson had engaged in many telephone conversations with Pennington, about criminal activities, and spoke to Pike some three times. The police began surveillance of Pike's home as a result. On March 5, 2007, Pennington told Gabrielson that Pike had one or two guns that he could sell, and promised to talk to Pike about it. Late that night, he called the officer back to see if he was interested in a .22 revolver and mentioned that Pike had recently sold a .357 pistol. Pike, who was present, offered Gabrielson the weapon, and they agreed after negotiation to the sale, which was to be made in about an hour.

Gabrielson proceeded to the location and met Pennington, who had the gun. Pennington then returned to Pike's home with the money. Pike, a felon, was indicted and requested suppression of Pennington's statement that incriminated him. That was denied and the recordings were introduced. Pike was convicted and appealed.

ISSUE: Are statements made to an undercover officer testimonial?

HOLDING: No

DISCUSSION: The trial court had found that the statements were properly admitted under FRE 801(d)(2)(E) as a "statement by a coconspirator of a party during the course and in furtherance of the conspiracy" - and were not hearsay. Such statements must be corroborated by independent evidence. In this situation, there was no doubt the two were conspirators, and the officer provided corroboration. As to Pike's assertion that the statement was testimonial, under Crawford v. Washington, the Court agreed "statements made in furtherance of a conspiracy are inherently testimonial in nature."[253] The statements were clearly not made in anticipating of a prosecution, but during the commission of a crime. Because neither party knew that Gabrielson was an officer, the statements "were not the product of interrogation and were not testimonial in nature."[254]

Pike also argued that because he was never seen in actual possession of the firearm, that there was insufficient evidence to show he was in control of it. The Court agreed that the introduction of the statements was not improper and upheld Pike's conviction.

Montgomery v. Bagley, 581 F.3d 440 (6th Cir. 2009)

FACTS: Montgomery was charged in Lucas County, Ohio, with the murders of Ogle and Tincher during the course of an armed robbery. He was convicted, and ultimately went through a lengthy post-trial appeal in the state court. He then petitioned for habeas through the federal court. The District Court denied all of his claims except for an allegation under Brady, in that the State had withheld a police report indicated that Ogle

[253] 541 U.S. 36 (2004).
[254] See U.S. v. Mooneyham, 473 F.3d 280 (6th Cir. 2007).

was seen four days subsequent to her apparent murder. (Ogle was considered missing for some days prior to her body being found.) The District Court had found there was no doubt that the State had refused to disclose the report, which was discovered some six years after Montgomery's trial. It also agreed that there was a reasonable probability that it was exculpatory and that its disclosure would have affected the outcome of the trial. It then issued a writ in favor of Montgomery.

However, following a newspaper story about the issuance of the writ, several people who were involved in the initial report contacted the police to state they'd been mistaken, and that they'd seen Ogle's younger sister, instead. The District Court refused to consider that evidence, however. The prosecution appealed.

ISSUE: Must reports of other witnesses be turned over to the defense under Brady?

HOLDING: Yes

DISCUSSION: First, the Court discussed the state's initial argument that the report was not evidence because it was inadmissible hearsay. The disclosure of the report "would have led to witnesses who would have case serious doubt on the State's case." As such, the Court determined it was exculpatory evidence. Further, the Court noted the report "strikes at the heart of the State's case" in that it directly contradicted a primary witness. Further, that witness's testimony led to the imposition of the death penalty and even if he'd been found guilty of murder, it might have led to a different punishment. The Court stated that "[u]nder Brady, it is incumbent upon the State to turn over all favorable exculpatory evidence. It is not the sole arbiter of what must be turned over." The Court found it immaterial that 23 years later, the witnesses filed retractions.

The Court affirmed the issuance of the habeas writ based upon the Brady violation.

Webb v. Mitchell, 586 F.3d 383 (6th Cir. 2009)

FACTS: Webb was convicted in Ohio of the aggravated murder of his son, Michael. The state courts affirmed his conviction, so he took a federal habeas corpus appeal. The U.S. District Court denied the motion, and he further appealed.

ISSUE: Is all failures to disclose reports a violation of Brady?

HOLDING: No

DISCUSSION: Webb argued that Ohio violated his rights because it failed "to disclose a police report issued five days after the fire."[255] The report suggested another possible suspect in the arson fire which resulted in Michael's death. Although the issue was not raised in the state court proceedings, the federal court "excused his procedural default and reviewed the claim on the merits because Webb did not learn of the police report until federal habeas discovery."

The Court reviewed the elements of a Brady claim, stating:

> A Brady claim contains three elements: (1) the evidence 'must be favorable to the accused' because it is exculpatory or impeaching; (2) the State must have suppressed the evidence,

[255] Brady v. Maryland, 373 U.S. 83 (1963).

> whether willfully or inadvertently, and (3) the evidence must be material, meaning 'prejudice must have ensued' from its suppression."[256]

To sum up, the key question must be - "did the failure to turn over the police report prejudice Webb's case?" The Court looked at the record and found that the police report did not satisfy the standard because Webb's argument as to what actually occurred (taking the information in the report as true) rested not only on "a precarious chain of inferences," but also on a "flimsy foundation." Key pieces of evidence directly linked Webb to the fire. The evidence in the report is "equivocal and does not 'markedly' strengthen" Webb's theory that the other subject set the fire.[257] Webb also argued that had he had the report, he could have impeached "the thoroughness of the police investigation." The Court noted that "any impact the suppression (withholding) had on Webb's trial preparations is irrelevant, however; 'only the effect on the trial's outcome matters.'"[258]

Webb's conviction was affirmed.

U.S. v. Wheeler, 2009 WL 3377925 (6th Cir. 2009)

FACTS: On June 15, 2006, Athens, GA law enforcement notified Memphis, TN police that Wheeler was wanted in connection with an armed robbery. They gave specific information concerning his vehicle and his destination. They found Wheeler and Finley (his girlfriend) in the described vehicle at the apartment. Finley owned the car and gave consent to search it, and the police found a sawed-off shotgun in a bag in the passenger compartment.

Wheeler was indicted on weapons charges. In anticipation of trial, he moved to exclude any "prior bad acts" evidence regarding the robbery in Athens; the prosecution countered that it was admissible to prove knowledge and intent under FRE 404(B). The Court denied Wheeler's motion. At trial, the prosecution presented testimony that put Wheeler in possession of a sawed-off shotgun less than 24 hours before his arrest and the jury was given a limiting instruction as to the purpose of the testimony.

Wheeler was convicted, and appealed.

ISSUE: May evidence of prior offenses be admitted?

HOLDING: Under some circumstances

DISCUSSION: Although the case at bar was not to determine whether the robbery in fact occurred, the Court agreed there was sufficient evidence for a jury to "reasonably conclude" that the robbery had taken place and that Wheeler was involved.

The problem arose in that the trial court apparently admitted the evidence "for the purpose of proving identity and absence of mistake," rather than the government's purpose to "show knowledge and intent."

The Court continued:

> Evidence of other acts is probative of a material issue other than character if (1) the evidence is offered for an admissible purpose, (2) the purpose for which the evidence is offered is

[256] Strickler v. Greene, 527 U.S. 263 (1999).
[257] Kyles v. Whitley, 514 U.S. 419 (1995).
[258] Wilson v. Parker, 515 F.3d 682 (6th Cir. 2008).

material or 'in issue,' and (3) the evidence is probative with regard to the purpose for which it is offered.[259]

Further:

> The "government's purpose in introducing the evidence must be to prove a fact that the defendant has placed, or conceivably will place, in issue, or a fact that the statutory elements obligate the government to prove."[260]

Unfortunately, the Court ruled that the trial court erred in its purpose, because the case did not present any issue of absence of mistake or identity. Wheeler's sole defense was that he didn't know about the gun in the car. However, the Court found that the evidence would have been properly admitted to show Wheeler's knowledge. Further, the instructions were adequate to address the purpose for which it was being admitted – "to prove Wheeler knowingly possessed the firearm."

Wheeler's conviction was affirmed.

U.S. v. Davis, 577 F.3d 660 (6th Cir. 2009)

FACTS: In July, 2007, Davis "decided to go joyriding in a rented car accompanied by his friend, Senecca McElwee, and a gun." The car was rented for him by a friend. On July 10, McIntosh, 17, was walking with a relative and 2 children when they recognized Davis, and could see he was holding a gun. She believed he'd been involved in a murder a week earlier in Grand Rapids. She picked up the pace, concerned about the children, and tried to call 911. The first call was dropped but she reconnected and gave them the plate number. (She was mistaken as to the make and model, but the two vehicles are very similar.) Although she'd only seen one weapon, she told dispatch she saw two, thinking this would cause a quicker response. She was also mistaken in how long it had been since she'd seen the car, in fact, it was less than a minute.

On July 11, 2007 Officer LaFave (Grand Rapids) was flagged down by a woman and given the same information. He put it out on the radio. Douglas, who was an occupant in the car at the time, later stated that they learned immediately that the police had been called. The men drove to a house and went inside to discuss the matter and smoke marijuana. They decided to switch the car for another, through the person that had originally rented it. When the PD ran the plate and discovered it was a rental, they quickly learned of the planned switch. They placed the new car, still on the rental lot, under surveillance. When it was picked up, they immediately made a traffic stop. Davis, in the front passenger seat, did not immediately comply but moved to place something under the seat. The officers searched the car and found a firearm under the passenger seat, along with a small baggie of marijuana. The officer later stated the weapon could not have been just thrown under the seat, but that its placement was consistent with the "stuffing" motion they'd observed. Davis was taken into custody and waived his Miranda rights. He initially denied everything, but later admitted to the marijuana. He continued to deny the gun, however, and the other occupants also denied knowledge of the firearm.

Davis was indicted for being a felon in possession, and objected to the admission of the two statements. The Court denied his motion. Eventually, Davis was convicted and appealed.

ISSUE: Are present sense impression statements admissible?

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[259] U.S. v. Carney, 387 F.3d 436 (6th Cir. 2004).
[260] U.S. v. Merriweather, 78 F.3d 1070 (6th Cir. 1996).

HOLDING: Yes

DISCUSSION: First, the Court addressed the statements made by an unidentified woman to Officer LaFave. The trial court had admitted the statement, holding that it was not hearsay, because it was "being offered not to prove the truth of the matter asserted, but to aid in understanding the officers' subsequent actions." [261] His testimony, "read in context, fairly precisely provides an explanation of what [Davis] subsequently did and said in the afternoon…." The jury had been "properly invited to focus on [Davis's] reaction to the statement, not the 'truth' of the substance." The Court agreed that it was not hearsay.

With respect to the 911 call, the trial court had ruled it was admissible "as both an excited utterance and a present sense impression" under the Federal Rules of Evidence 803. The call was made within a minute of McIntosh spotting Davis in the car and was essentially contemporaneous with that event. The Court agreed that the excited utterance exception was weaker, since "there were certain acknowledged 'exaggerations' in McIntosh's 911 call." However, the Court agreed that the exaggerations went on the weight and not the admissibility of the evidence. The Court also disagreed that the admission of the unknown woman's statement violated the Confrontation Clause, since again, the statements were not admitted to prove the truth of the matter contained.

Finally, the Court agreed there was sufficient evidence for the jury to find that he had been in constructive possession of the firearm. The Court found his theories about the gun "inventive or interesting," they were unavailing. Finding the evidence of Davis's guilty abundant, the Court upheld his conviction.

U.S. v. Mosley, 2009 WL 2391949 (6th Cir. 2009)

FACTS: On November 1, 2007, at about 12:30 a.m., Detroit police saw a vehicle make an illegal turn. They made a traffic stop; Mosley was the sole occupant. Two officers approached; one saw the driver's hand momentarily hidden between the seats. The other officer asked for and received Mosley's documents. As the officers returned to their car, one officer told the other about what he had observed. Both returned to the car and Officer Woodcum asked Mosley to get out. The officer received consent to search. In the area between the seats, the officer observed "an upside down handgun." Mosley, a convicted felon, was arrested. No further evidence was found in the car.

No evidence was recovered from the handgun that linked it to Mosley. He was tried, convicted, and then appealed.

ISSUE: Is a subject's proximity to a weapon an indication they are in constructive possession of that weapon?

HOLDING: Yes

DISCUSSION: Mosley argued that he was not in sufficient possession of the weapon to support the charge. "In this case, [Mosley] was the sole occupant of the vehicle containing the gun" and made suspicious motions in the "precise area" where the gun was later found.

The Court upheld his conviction.

[261] U.S. v. Gibbs, 506 F.3d 479 (6th Cir. 2007).

U.S. v. King, 2009 WL 2407684 (6th Cir. 2009)

FACTS: On January 24, 2006, Toledo officers executed a warrant on a local residence. After SWAT had secured the location, Det. Scoble found King and Richardson secured on the floor. Det. Rider searched both men and gave them Miranda. During the search, an officer found a rock of crack cocaine in one of the bedrooms and upon asking, learned it was King's bedroom. They also found other evidence that linked King to the residence, including mail and medicine bottles, along with a gun. King denied that any more guns were in the house, which was the case. He also stated that there was marijuana in his jacket, in the bedroom. More crack cocaine was also found. He made incriminating comments to Det. Scoble and indicated as he left that it was "his house."

The property was actually owned by King's niece, and in fact, later evidence indicated that although he was there daily, he did not actually live there. The current tenant of the house was in jail. King was indicted, tried, and convicted. He appealed.

ISSUE: May a subject possess items in a home he doesn't own?

HOLDING: Yes

DISCUSSION: King argued that since he did not live in the house, there was insufficient evidence that he possessed either the drugs or the gun for which he was charged. He contended that he was at the house simply to walk dogs that were left there and that he "never exercised dominion or control over the residence." The Court noted, however, that King stated that the bedroom was his and there was no one else living in the house. Items were found in the house clearly linked to King. He also knew the "contents of the bedroom and the residence" - his statements to that effect were proved to be true. Finally, he admitted to one of the detectives that he'd "been selling drugs before the detective had even been in training."

After resolving other issues, including an objection to Det. Coble's testimony that King possessed the items, which the Court agreed was actually in response to one of King's own questions, the Court affirmed his conviction.

U.S. v. Britton, 2009 WL 1884468 (6th Cir. 2009)

FACTS: On Aug. 27, 2005, Officers Hulsey and Davis (Memphis PD) were patrolling a high drug trafficking area. They were in special black uniforms and driving a black unmarked van. They got a report of a drug transaction and proceeded to the location. Near the reported location, the officers found three young black men (including Britton). The officers reported that they were "standing on the sidewalk in front of the house so as to impede pedestrian travel," although there were no pedestrians in the area. Other witnesses stated that they were standing in the yard or the driveway, at a house owned by a relative of one of the men. Officer Hulsey, "apparently casting about for a reason to detain the men," drove toward them to arrest them for obstructing the walkway. Officer Davis got out and ordered them to show their hands. They were apprehended and searched by Hulsey while proned out. Britton, however, moved toward the house. He took off and Davis chased him. As Britton scaled a fence, a silver object fell from his waistband, which turned out to be a handgun. He was apprehended and charged with the obstruction offense, evading arrest and unlawful possession of the weapon.

The prosecution dismissed all state charges, however, but a federal charge was placed against Britton, a felon, for the weapon possession. Britton moved for suppression of the gun. The trial court concluded that the "officers lacked probable cause to arrest the three individuals for obstructing the sidewalk." However, once

Britton ran, Officer Davis had reason to chase him. The Court denied the suppression. Britton took a conditional guilty plea and appealed.

ISSUE: Is a gun dropped as a result of an unlawful action by police admissible?

HOLDING: Yes

DISCUSSION: First, the government argued that Britton lacked standing, because he had "discarded the gun before he was apprehended." The court noted that "a finding of abandonment must be based on some evidence that the defendant intended to renounce ownership of property." The evidence indicated that he simply dropped the gun, not that he threw it down. However, the Court noted that although Britton's arrest was arguably illegal, he was not under arrest when he dropped the gun, he was simply being chased. The "gun was not discovered as the result of a 'search' –but "[r]ather, … was publicly exposed through [Britton's] action, albeit inadvertently." Britton makes the point that he would never have dropped the gun if the police did not provoke the chase by trying to detain him, which they had no legal right to do. It is true that Officers Hulsey's and Davis's action in rousting Britton and his friends from their lawful gathering was unlawful police conduct that ought to be deterred. However, the Supreme Court has never held that invocation of the exclusionary rule is justified by the use of unlawful police action by itself. In order to exclude evidence under constitutional doctrines of the exclusionary rule on the fruit of the poisonous tree, the defendant must show more than "the mere fact that a constitutional violation was a 'but-for' cause of [the police] obtaining [the] evidence."[262]

The Court continued:

> It is plainly apparent that Britton's dropping the gun was inadvertent, a mere happenstance. There is no evidence that the police intended to provoke flight or a chase or otherwise exploited the circumstances to cause Britton to shed his possessions. Nor has Britton shown that he had a reasonable expectation of privacy in the area of the yard where the gun was exposed.

The Court concluded that the exclusionary rule did not demand the suppression of the evidence in the case and affirmed the decision not to do so.

Akrawi v. Booker, 572 F.3d 252 (6th Cir. 2009)

FACTS: Akrawi was tried along with eight co-defendants in a large drug trafficking operation. Much of the prosecution's case centered on the testimony of Abood, who had been in jail in a similar case and he was released on a lowered bond to assist in the Akrawi case. (The investigating officer, Pappas, was to "advise the prosecutor of the extent of Abood's cooperation while released on bond.")

Abood testified as to several transactions in which he purchased cocaine from Akrawi - he later stated that "no one promised him anything for his testimony and no one had threatened him." He admitted that he hoped that the cooperation would help him in his own case and that he was concerned about being deported, as he was not a U.S. citizen. He had testified before the grand jury that he wanted to "help rid the streets of drugs." The investigator testified that he did not request anything for Abood, but that he knew the prosecutors were considering a reduction in Abood's charges because of his cooperation.

[262] Hudson v. Michigan, 547 U.S. 586 (2006).

Akrawi was convicted and appealed, but he was denied leave to appeal. Following Akrawi's conviction, however, "Abood's situation had improved dramatically." Eventually, Abood pled guilty and received lifetime probation, because his testimony had proved "crucial" in the Akrawi case. Following the discovery of more information concerning the deal, Akrawi appealed to the trial court, contending that the prosecution failed to disclose information regarding the cooperation agreement. At further proceedings, Pappas stated that he made no promises to Abood, and that he had no authority to make any promises. One of the prosecutors agreed that the "possibility of a charge-reduction was the benefit that Abood hopeed or expected to gain by his cooperation." The trial court agreed that Akrwai was entitled to a new trial. Before the trial was conducted, however, the Michigan courts found that no firm agreement was reached until after Abood testified, and that all of the communications that occurred before were only a "future possibility of leniency." Akrawi moved of habeas in the federal court and the U.S. District Court agreed that the prosecution had wrongfully suppressed evidence of the deal in Akrawi's favor. However, it also ruled that the nondisclosure did not result in such actual prejudice that he was entitled to review. Akrawi further appealed.

ISSUE: Is the defense entitled to know about informal deals with witnesses?

HOLDING: Yes

DISCUSSION: The Court noted that the extent to which the "rule of Brady requires disclosure not just of evidence of formal cooperation agreements, but also evidence of informal communications between the prosecution and a witness, has received significant attention in recent Sixth Circuit case law." Further, in Bell v. Bell, "the court noted that '[i]t is well established that an express agreement between the prosecution and a witness is possible impeachment material that must be turned over under Brady'"[263] In addition, it stated that "[t]he existence of a less formal, unwritten or tacit agreement is also subject to Brady's disclosure mandate." And to further confirm, "Brady is not limited to formal plea bargains, immunity deals or other notarized commitments. It applies to 'less formal, unwritten, or tacit agreement[s],' so long as the prosecution offers the witness a benefit in exchange for his cooperation, . . . so long in other words as the evidence is 'favorable to the accused.'"[264]

But, the Court continued:

> Yet, the mere fact that a witness desires or expects favorable treatment in return for his testimony is insufficient; there must be some assurance or promise from the prosecution that gives rise to a *mutual* understanding or tacit *agreement*. Further, the mere fact of favorable treatment received by a witness following cooperation is also insufficient to substantiate the existence of an agreement. "[I]t is not the case that, if the government chooses to provide assistance to a witness following trial, a court must necessarily infer a preexisting deal subject to disclosure under Brady." "The government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witness prior to the testimony."

As such, the Court found that the question is "whether the prosecution made assurances or representations to Abood suggesting the existence of a mutual understanding or tacit agreement - evidence favorable to Akrawi because of its impeachment value." The Court found that the Michigan courts' decisions were based on fundamental errors of law. The Court found that there was an informal agreement or mutual understanding

[263] 512 F.3d 223 (6th Cir. 2008)
[264] Harris v. Lafler, 553 F.3d 1028 (6th Cir. 2009)

that Abood would receive leniency for his cooperation. But that isn't the end of the story, as the Court noted that it was also necessary to also find prejudice by the error. The Court noted that although no direct evidence was presented, that the jury did hear substantial evidence about the potential for a reduction in the charges. There was highly incriminating evidence from another source and Abood's testimony was not the centerpiece of the prosecution's case. But Akrawi argued that the testimony giving by several of the parties was in fact false, in that they testified that there was no promise of leniency. The Court found that that the testimony was misleading, but not indisputably false and was "technically accurate." It found "scant evidence of an actual meeting of the minds."

The Court found the alleged perjury to be of "relatively minor significance." The Court ruled that although the prosecution did violate Brady, it did not demonstrate sufficient proof that the nondisclosure resulted in actual prejudice. Akrawi's conviction was affirmed.

Evans v. Mitchell (Warden), 2009 WL 2707379 (6th Cir. 2009)

FACTS: On March 25, 1987, Richards and Williams were stabbed to death in their Cleveland apartment. Speights (Williams' son) was injured, but survived. Richards' son Albert, age 7, and an infant were also present. A robbery also took place.

Evans and the Fraziers were charged with murder. Evans was convicted of both murders and received the death penalty. His appeals were denied and he took a collateral appeal. The District Court denied the claim but permitted the appeal.

ISSUE: May a 7 year old witness be considered to be competent?

HOLDING: Yes

DISCUSSION: First, the Court agreed that Albert Richards was a competent witness and that he understood the oath and his duty to testify truthfully. Evans also argued that the "government withheld a supplemental police report …" and that he was not told that one of the Fraziers "was testifying pursuant to a plea agreement." The Court concluded, however, that the information in the supplemental report was not material, nor was it exculpatory. With respect to the plea agreement, the Court found that it occurred after the trial, and Frazier's "motive to testify against Evans was discussed in open court, and Evans could have impeached Frazier on those grounds." The Court upheld Evans' conviction.

U.S. v. Neeley, 308 Fed.Appx. 870 (6th Cir. 2009)

FACTs: Neeley was charged with criminal conspiracy related offenses. Two federal officers gave a "combination of opinion and fact testimony, although neither was formally qualified by the court as an expert." The first, Agent Hughes, currently of the DEA and formally of the INS, testified as to his experience with illegal narcotics. He detailed the investigation and addressed the significance of certain evidence that was found. Agent Woosley, an IRS CID agent for over 18 years, described his education and experience in his field. He "offered opinion testimony" as to the value of certain transactions, and provided definitions for numerous terms. Neeley was convicted, and appealed.

ISSUE: Must officers be formally qualified as experts to so testify?

HOLDING: No (but see discussion)

DISCUSSION: Neeley complained that the Court had failed "to perform its 'gatekeeper' function … when it permitted [the agents] to give opinion testimony without making a formal finding on the record that they were qualified as experts under" FRE 702.[265] The Court had "specifically addressed the issue of formally qualifying police officers as experts" in U.S. v. Johnson.[266] In that case, the Court had recommended that "the proponent of the witness should pose qualifying and foundational questions and proceed to elicit opinion testimony." The Court noted that the agents possessed "obvious qualifications," and that it was unnecessary for the Court to "conduct a formal inquiry in the qualifications of a witness before allowing expert testimony." In the Sixth Circuit, the Court had "regularly allow[ed] qualified law enforcement personnel to testify on characteristics of criminal activity, as long as appropriate cautionary instructions are given, since knowledge of such activity is generally beyond the average layman."[267]

Neeley also argued that it was error to allow Agent Hughes "to testify as both a fact and expert witness without giving the jury a cautionary instructions regarding his dual role." The Court had previously ruled that the jury might be confused by this and that the court must "take care to assure that the jury is informed of the dual roles of a law enforcement officer as a fact witness and an expert witness, so that the jury can give proper weight to each type of testimony."[268] Neither did the prosecutor "delineate the transitions between the examination of the officer as an expert witness and questions relating to his role as a fact witness."[269]

The Court found that the instructions given about the dual role was sufficient and Neeley's conviction was affirmed.

U.S. v. Miller, 2009 WL 792842 (6th Cir. 2009)

FACTS: During Miller's trial, the Court permitted someone other than the actual fingerprint analyst to testify concerning the matter. (The officer in charge of the lab testified as to the results, using the report prepared by the analyst.) Miller was convicted and appealed.

ISSUE: May an officer testify using the report of a fingerprint analyst?

HOLDING: Yes

DISCUSSION: The Court admitted the report under the business records exception to the Rule of Evidence.[270] The Court noted that Miller's counsel actually asked several of the complained-upon questions, that he could not complain of the responses. In addition, "because the out-of-court statements were offered by, not against, the accused, the Confrontation Clause" did not apply. Finally, the Court noted that the testimony from the actual analyst would have added nothing beyond what the laboratory supervisor was able to provide.

Miller's conviction was affirmed.

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[265] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Kumho Tire Company v. Carmichael, 526 U.S. 137 (1999).
[266] 488 F.3d 690 (6th Cir. 2007).
[267] U.S. v. Swafford, 385 F.3d 1026 (6th Cir. 2004).
[268] U.S. v. Thomas, 74 F.3d 676 (6th Cir. 1996).
[269] U.S. v. Cobbs, 233 Fed. Appx. 524 (6th Cir. 2007)
[270] FRE 803(6).

Fossyl v. Milligan/Watson, 2009 WL 692163 (6th Cir. 2009)

FACTS: Miligan and Watson were allegedly involved in the death of Fossyl, in 1977. The investigation went cold but was reopened in 2000 when a new sheriff was elected. Watson submitted to a polygraph, and while both parties later stipulated that the actual results of the polygraph was inadmissible, the Court did admit statements made by Watson before and after the test was performed. Both men were sued by Fossyl's estate, and a judgment was rendered against them for wrongful death and related claims. Both appealed.

ISSUE: Is the mention of a polygraph inadmissible in a civil case?

HOLDING: No (but see discussion)

DISCUSSION: The Court agreed that in Ohio, the results of a polygraph examination are not generally admissible. However, the Court noted that Watson "voluntarily submitted to the polygraph and questioning." As such, the Court noted that had the polygraph not been mentioned, the jury would have been confused about the time frames and may have believed that he had been "railroaded by law enforcement authorities, when there is no evidence to support this."

After resolving a number of other issues, Watson's conviction was affirmed.

Adkins v. Wolever, 554 F.3d 650 (6th Cir. 2009)

FACTS: Adkins, a state prisoner in Michigan, sued Officer Wolever (a state prison corrections officer) for assault. Before the lawsuit was filed, an investigator had reviewed Polaroid photos of the injuries and video of the area where the assault allegedly occurred. The material was requested in discovery, but the originals could not be located – having been either lost or destroyed. (Adkins did receive black and white copies of the photos.)

Adkins requested a spoliation instruction to the jury, asking that the jury be told that "it could presume that the missing video and color photographic evidence would be favorable to Adkins." The District Court, however, applying Michigan law, denied the request, because Michigan "required Adkins to demonstrate that the spoliated evidence was under Wolever's control, which it undisputedly was not."

ISSUE: Is federal law to be applied when decided upon sanctions for spoliation of evidence?

HOLDING: Yes

DISCUSSION: The Court noted that the Sixth Circuits "application of state law to spoliation sanctions in federal question cases finds its origins in Welsh v. U.S."[271] The Court observed, however, that "other circuits apply federal law for spoliation sanctions." The Court agreed that was the proper way to do it, and remanded the case for the trial court "to decide if Wolever should be subject to any form of spoliation sanctions despite the fact that he was not the prison records custodian."

U.S. v. Buffington, 310 Fed.Appx. 757 (6th Cir. 2009)

FACTS: During Buffington's trial, Officer Nanney (McKenzie, Tenn PD) was permitted to testify "regarding the police surveillance of Officer Cunningham's attempted undercover purchase of firearms." He

[271] 844 F.2d 1239 ( )

testified he heard a conversation between another officer and Buffington over a wire, and corroborated that officer's earlier testimony." He also testified on cross that they had found unidentified fingerprints on a recovered stolen weapon, but did not test for trace evidence, and repeated information he had received from Buffington's wife.

Buffington was eventually convicted on weapons charges and appealed.

ISSUE: Is a violation of the Confrontation Clause always fatal to a case?

HOLDING: No

DISCUSSION: The Court agreed that Mrs. Buffington's "statement was testimonial because she provided Officer Nanney with the information about the blankets and sleeping bag [found wrapped around the weapons] in the context of a police interrogation."[272] Further, "because the statement at issue pertains to the question of whether Buffington possessed the firearms, it goes to the heart of the Government's case."[273] However, the Court concluded that, given the wealth of other evidence against Buffington, the admission was harmless error and did not materially affect the verdict.

Buffington's conviction was affirmed although the case was sent back for re-sentencing for unrelated reasons.

U.S. v. Rodriguez-Lopez, 565 F.3d 312 (6th Cir. 2009)

FACTS: On Oct. 13, 2006, a DEA agent arranged to buy heroin from Robles-Manguia, in the parking lot of a Louisville shopping center. Both Robles and another man were arrested. Robles admitted, at the scene, that he had intended to sell 56 grams to the agent, and that the other man, Lopez, was the lookout. Lopez "insisted that he knew nothing about any drug deal and denied that he had been circling the parking lot." During the discussion, Lopez's cell phone rang repeatedly. Agent Perryman answered each time, and each time, the caller requested heroin.

Lopez moved for exclusion of the cell phone calls. The trial court agreed they were inadmissible hearsay and the government appealed.

ISSUE: Are all repeated out-of-court statements hearsay?

HOLDING: No

DISCUSSION: The Court noted that there was no evidence as to exactly what the callers said, but stated that "whatever their grammatical mood, the statements are not hearsay because the government does not offer them for their truth." Certainly, "the fact that [Lopez] received ten successive solicitations for heroin is probative circumstantial evidence of his involvement in a conspiracy to distribute heroin."

The Court stated:

> And the fact that out-of-court statements are being used to support a material inference does not by itself make them hearsay; it makes them relevant.

[272] See Crawford v. Washington, 541 U.S. 36 (2004).
[273] U.S. v. Martin, 897 F.2d 1368 (6th Cir. 1990)

The Court reversed the decision to exclude the evidence and remanded the case for further proceedings.

Willis v. Jones, 2009 WL 1391429 (6h Cir. 2009)

FACTS: Willis was charged, and eventually convicted in 1993, for an armed robbery that resulted in a death. Some time later, in post-conviction appeals, he learned that critical evidence had been withheld from him. He filed for habeas relief, arguing "newly discovered evidence." Following a lengthy procedural process, he reached the present court.

ISSUE: Is a late appeal based upon newly discovered evidence permitted?

HOLDING: Yes

DISCUSSION: Although the prosecution argued that Willis's appeal was not timely, the Court agreed that Willis had shown "due diligence because he had no reason to know that the state had not disclosed Brady evidence." Specifically, the state had withheld information concerning an unidentified palmprint connected with the scene, because "Willis could have used it to impeach the credibility of the investigating officer who subsequently denied that the record existed."

The Court continued:

> Brady's requirements of disclosure apply to "impeachment evidence as well as exculpatory evidence," apply even if the accused does not ask for the evidence, and apply regardless of the good faith of or even knowledge of the prosecution that police have the evidence. [274] In Strickler, the Supreme Court held that the habeas petitioner had shown cause to excuse procedural default of his Brady claim because, where the petitioner had no reason to believe at the time of trial that the state had withheld *Brady* evidence, the petitioner was entitled to rely on the state's duty to disclose.

The Court reversed the decision to have the trial court reconsider Willis's petition to the extent that he claims relief based on the untimely disclosure of the record.

U.S. v. Mellies, 2009 WL 1391539 (6th Cir. 2009)

FACTS: On June 21, 2004, "while Mellies was out of town, his wife, Lisa, voluntarily provided the Dickson County Sheriff's Office in Charlotte, Tennessee, with a laptop computer and 47 compact discs, many of which contained child pornography. Mrs. Mellies consented to a search of the home she shared with her husband and fourteen-year-old son from her prior marriage." That search revealed a space where it was apparent a computer had been located. The officers got a warrant for Mellies and he was arrested when he returned home.

Detective Buddy Tidwell conducted a forensic examination of the electronic evidence. In all, approximately 11,000 images, hundreds of movies, and stories ranging from the "high dozens to low hundreds" depicting child pornography were found on the laptop and approximately 23 CDs. While most of the child pornography was stored on the CDs, approximately 493 images were saved on the laptop. The pictures and movies depicted vaginal, anal, oral, and digital penetration, as well as bondage and torture, of children. Most of the files and folders storing the child pornography had innocuous names, although some were sexually explicit and

[274] Strickler v. Greene, 527 U.S. 263 (1999).

referred to children. The majority of the files were password-protected. Each CD containing child pornography was marked with a written symbol. Tidwell estimated that it would have taken months to download the thousands of images and hundreds of video files of child pornography, zip the images into files, and name the "hundreds and hundreds of directories" storing them.

Further:

> Tidwell also testified that he was "reasonably certain," based on "the totality of the evidence and everything that I have examined," that defendant Mellies was responsible for collecting the child pornography. According to Tidwell, "the vast majority of the activity that occurred on [the] laptop [was] attributable" to defendant Mellies because "it's very seldom that I would encounter a piece of media or a body of media like this that is so devoid of multiple users or so devoid of other explanations. I mean . . . an overwhelming amount of evidence in this laptop points to a single owner/user." Tidwell based his conclusions on several discoveries. [3]Detective Tidwell testified that "YUIATTA" and "YUI02" were references to the Three Stooges, one of whom often used the catch phrase, "Why, you, I oughta . . ." [4]Defendant was previously employed by PAL Health Technologies, and a large number of documents found on the laptop related to that company.
>
> The laptop stored hundreds of documents, including cover letters, résumés, and fax cover sheets, as well as 1,199 emails and five email addresses that were all associated with defendant Mellies, except a single email message that was signed by Lisa Mellies and one document written by her son. The laptop's operating system and various software found on the computer were registered to defendant, and the computer was named "YUI02."[3] There were no other registered users or owners of software. From January 18, 2001, until July 15, 2004, the user names associated with the Mellies' internet account were "YUI02" and "WyattPal,"[4] and the contact person on the account was defendant. From May 24, 2004, through June 20, 2004, the account connected to the internet 68 times, for a total of 120 hours, and downloaded 1.6 gigabytes of information, or more than one-third of the entire amount of space available on the laptop.

Hidden archives on the computer indicated that the "images and video files on the CDs were once located on the laptop."

Mellies was convicted and appealed.

ISSUE: Does law enforcement have a responsibility to preserve all potentially exculpatory evidence?

HOLDING: No

DISCUSSION: Mellies argued that his rights were violated because the government destroyed "potentially exculpatory fingerprint evidence and a computer." During the investigation, the "government scrubbed and washed (resurfaced) the CDS, therefore destroying potentially exculpatory fingerprints." Further, a Gateway computer was lost or destroyed, which he alleged could have "solved mysteries" in the case.

The Court noted:

> The Supreme Court has stated that the Due Process Clause does not impose upon the police "an undifferentiated and absolute duty to retain and to preserve all material that might be of

> conceivable evidentiary significance in a particular prosecution."[275] The parties agree that where, as here, the basis for defendant's due process complaint is that the government failed to "preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated" him,[276] he must show: "(1) that the government acted in bad faith in failing to preserve the evidence; (2) that the exculpatory value of the evidence was apparent before its destruction; and (3) that the nature of the evidence was such that the defendant would be unable to obtain comparable evidence by other means." [277] Mere negligence, even gross negligence, by the government in failing to preserve potentially exculpatory evidence does not establish the required bad faith.[278]

Tidwell also noted that he was in a dilemma, because the only way to read the CDs was to clean the surface, and that doing so did not affect any prints on the non-data side. The Court concluded that the "exculpatory value of the evidence was not apparent before its alleged destruction" as it was purely speculative that the CDs even contained fingerprints, and if so, that they would be exculpatory. With respect to the missing computer, the Court also concluded that its exculpatory nature was speculative, and would not have offset the incriminating evidence at trial.

Mellies conviction was affirmed.

U.S. v. Hudson, 325 Fed.Appx. 423 (6th Cir. 2009)

FACTS: Hudson was charged on the basis of information provided by a CI to a Shelby County (TN) officer. That information was used to obtain a search warrant, and the officers found a variety of drugs, money and guns. Hudson was indicted, and filed a motion to disclose the informant's identity, as well as a Franks hearing, accusing the detective of including false statements in his affidavit.

The trial court denied the motions, although it did hold a hearing . Hudson took a conditional guilty plea, and appealed.

ISSUE: Must an informant's identity be revealed?

HOLDING: No (but see discussion)

DISCUSSION: The Court agreed that it is "well-established that the government is privileged not to reveal the identity of informants, … and thus a defendant bears the burden of showing how disclosure of an informant's identity would substantively assist his defense."[279] It is then up to the trial court to do an in camera review to decide if the identity should be disclosed. In this case, the court did so, and concluded that the identity need not be revealed. With respect to the CI, the Court agreed that the information provided was sufficient to find probable cause, although it agreed that "the better practice would have been for [the detective] to have provided in the affidavit more of the detail that he in fact provided in the hearing."

Hudson's plea was upheld.

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[275] Arizona v. Youngblood, 488 U.S. 51 (1988).
[276] U.S. v. Wright, 260 F.3d 568 (6th Cir. 2001) (quoting Youngblood, 488 U.S. at 57),
[277] Monzo v. Edwards, 281 F.3d 568 (6th Cir. 2002).
[278] Wright, supra.
[279] Roviaro v. U.S., 353 U.S. 53 (1957); U.S. v. Moore, 954 F.2d 379 (6th Cir. 1992).

FORFEITURE

Jones v. Whittaker, 2009 WL 633195 (6th Cir. 2009)

FACTS: On Feb. 12, 2004, Deputy White (Logan County SO) stopped Jones for weaving and having a non-illuminated license plate. Another deputy found a quantity of marijuana in the vehicle. Jones was arrested for DUI, resisting arrest and possession of marijuana, among other offenses. He was indicted and requested suppression. Eventually the case was dismissed, on June 30, 2006, but the Commonwealth requested a civil forfeiture of several assets owned by Jones and his sister. The Court, however, determined it did not have jurisdiction and dismissed the action.

Jones filed suit under 42 U.S.C. §1983, just under one year following the dismissal of the forfeiture action, claiming false arrest, malicious prosecution, defamation and, against the sheriff and the county, negligent training and supervision, along with related claims. The deputies claimed the statute of limitations had run and the trial court eventually agreed. Despite Jones' argument that the statute of limitations did not begin to run until the end of the civil forfeiture action, the Court ruled that the civil forfeiture was not part of the criminal case but is, instead a separate action.

Jones appealed.

ISSUE: Is a civil forfeiture part of the criminal proceedings?

HOLDING: No

DISCUSSION: Jones only argument on appeal was that his malicious prosecution claim did not accrue until the civil forfeiture proceeding ended. The Court noted that Kentucky law was clear in that the forfeiture was a separate, civil, in rem, proceeding against the property and not part of the criminal proceeding. (Kentucky law had also made it clear that the forfeiture was not double jeopardy.) In fact, other individuals in addition to Jones were parties to the case, specifically his sister, who shared ownership of some of the property and the bank holding the mortgage. The Court noted that although a criminal conviction is necessary for a successful forfeiture, it does not make it part of the criminal proceedings.

The Court agreed that the case was time-barred and dismissed the lawsuit.

EMPLOYMENT

Miller v. City of Canton, 319 Fed.Appx. 411 (6th Cir. 2009)

FACTS: Miller (and Fowler) alleged that the City of Canton Police Department discriminated against them because of their race. Miller (a white officer and president of the union) had issued a press release alleging that Chief McKimm discriminated against black officers. (Fowler was a black officer allegedly aggrieved by the discrimination.) As a result of the press release, Miller was suspended for 60 days, but he was eventually given back pay and benefits for that time. Miller filed an EEOC complaint and eventually sued, arguing retaliation. Fowler was one of four black officers who had allegedly received discriminatory disciplinary actions, including a recommendation for termination that was eventually reduced by an arbitrator. He also filed an EEOC complaint and then filed suit.

The District Court magistrate recommended both Fowler's and Miller's cases be dismissed, finding that they did not sustain their initial burden of proof. They appealed.

ISSUE: Is an officer who makes a statement of public interest that is not part of his position to make protected by the First Amendment?

HOLDING: Yes

DISCUSSION: The Court noted that for a government employee to "establish a *prima facie* case of retaliation under 42 U.S.C. §1983, a plaintiff must show that (1) the plaintiff engaged in constitutionally protected speech; (2) the public employer subjected the plaintiff to adverse action; and (3) the adverse action was motivated by the protected speech."[280] To determine if the speech is, in fact, constitutionally protected, Miller must first show that the speech involved a matter of public concern and that the speech was made outside the duties of employment. Matters of public concern include "any matter of political, social or other concern to the community" and do, of course include allegations of racial discrimination and police corruption. Further, Miller's speech was not connected directly to his public employment - "the press release fell outside of Miller's official duties as a police officer."

The Court agreed that Miller passed both threshold tests, so the Court was required to "engage in the balancing test set forth in" Pickering v. Bd. of Education.[281] That test required the Court to balance the interests of the citizen-employee with the government's interest, and the "weight given to the governmental interests varies depending on the nature of the protected speech." The stronger the public concern, the greater the burden on the government to show that the speech was detrimental to the public interest. In this case, the Court found that Canton had put forth no evidence that the press release caused any workplace disruption or interfered with the function of the police department. The Court agreed that Miller's speech was protected by the First Amendment.

Next, the Court moved on to consider his retaliation claim, in which he was required to prove that the City acted adversely against him because of his speech. Adverse action means "an injury that would likely chill a person of ordinary firmness from continuing to engage in [the protected] activity."[282] The Court agreed that his suspension was an adverse action, and the City had not contested that "took disciplinary action against Miller because of the press release, although it maintains that the contents were not protected." As such, the Court agreed that "Miller had made out a prima facie case of retaliation under §1983." The Court reversed the summary judgment claim in favor of the City.

With respect to Fowler, the Court ruled that he had not made out a case to show that he was treated differently from similarly situated white officers, however, nor was he able to made a connection between any protected activity and an adverse action. As such, the summary judgment for the City against Fowler was upheld.

Hollimon v. Shelby County Government, 325 Fed.Appx. 406 (6th Cir. 2009)

FACTS: Starting in Oct., 1987, Hollimon was a Shelby County (TN) police officer. She was fired in 2002 for several reasons, including a challenge to a department policy requiring officers to work at least one holiday a year, failing to report to work on an assigned holiday, calling a radio talk show while on duty to

[280] Scarbrough v. Morgan County Bd. of Educ., 470 F.3d 250, 255 (6th Cir. 2006); Miller v. Admin. Office of the Courts, 448 F.3d887, 894 (6th Cir. 2006) (citing Banks v. Wolfe County Bd. of Educ., 330 F.3d 888, 892 (6th Cir. 2003).
[281] 391 U.S. 563 (1968).
[282] Nair v. Oakland County Cmty. Mental Health Auth. , 443 F.3d 469, 478 (6th Cir. 2006).

complain about the department and leaving her squad car during a lunch break and taking an extended break. She refused to turn in her handgun and ID, and upon refusing, was also charged with disregarding an order. She filed an EEOC complaint and was issued a right to sue letter, but did not immediately file suit. After a hearing, her termination was finalized.

She filed suit and the trial ensued. The Court found in her favor, ruling that the reasons for her discharge were pretextual. The County sued.

ISSUE: May an officer succeed in a discrimination action when it is shown that a policy is being enforced selectively?

HOLDING: Yes

DISCUSSION: The Court found that there was sufficient evidence to support the trial court's decision. Although "Hollimon did not find an employee who violated each of the policies she (allegedly) did, she put in sufficient evidence showing that, when other similarly situated employees violated many of the same policies, the county either looked the other way or did not bother to enforce the policy."

The Court affirmed the lower court's decision.

Lentz v. City of Cleveland, 2009 WL 1563433 (6th Cir. 2009)

FACTS: Lentz, a Cleveland police officer, was guarding the home of the Mayor-elect in 2001. "He observed a station wagon proceed erratically down the street and abruptly stop behind his squad car. As Lentz approached, the car backed up, hit a tree, and Lentz somehow ended up on its roof. To get the car to stop as it drove toward an intersection—with him on top—Lentz fired fourteen rounds through its roof, injuring the black juvenile driver." Following the shooting, he was assigned to "police gymnasium duty pending an investigation and it is the lengthy duration of this assignment that spurred Lentz's complaint— he spent 652 days on gym duty, much longer than the time typically served by officers involved in shootings." The deadly force investigation team completed its investigation and referred it to the prosecutor, which submitted it to the grand jury. However, Lt. Klimak withdrew the case and held the file for five months before returning it to the prosecutor. It was submitted to the grand jury, which declined to indict on an assault charge, but which did indict on a minor falsification of information allegation. That charge was eventually dismissed. The police department, however, filed disciplinary charges - "(1) violating the "use of force" policy; (2) lying about the shooting; and (3) failing to notify dispatch before approaching the vehicle." Lentz conceded the last and the department dismissed the others. He was finally, 22 months after the shooting, reinstated and given back pay.

Lentz filed suit in federal court, and the case went to trial. The jury found the defendants (the City of Cleveland, and connected parties) "discriminated and retaliated against Lentz." The City appealed.

ISSUE: May officers prove discrimination by showing that they were treated differently from officers of another race similarly situated?

HOLDING: Yes

DISCUSSION: The Court noted that Lentz presented extensive evidence about gym duty, department charges, and the experiences of other officers." He also "employed circumstantial evidence to link his unique treatment to a discriminatory motive: African-American officers involved in shootings served much shorter gym details—the longest, 254 days, was less than half Lentz's assignment. Defendants seek to discredit that

evidence by arguing that those officers had different experiences, but "similarly situated" only requires comparability in 'all relevant respects,' not congruent experiences."[283] The Court agreed that since "[m]any of these officers participated in automobile-related shootings and received gym duty assignments while under investigation," the fit the requirements of similarly situated. The Court also agreed that the city's "nondiscriminatory reasons were pretextual." Specifically, Lt. Klimak's taking the file back, further delaying the resolution, and the Safety Director's "concerns with race relations and his desire to avoid 'another Cincinnati,' referring to large-scale race riots." Further, "five officers with the longest gym details were white officers who shot black suspects."

Moreover, Lentz offered evidence that City officials discussed handling shootings of black suspects "with care" to avoid "civil unrest"; that Draper met with the Cleveland NAACP President, who expressed race relations concerns; and that officials discussed the Cincinnati riots. The court even admitted news clips and a summary of television coverage of the shooting to highlight its "high profile" nature. Given this evidence, the jury could reasonably conclude that Defendants' espoused reasons were a pretext for the City's discriminatory decision to treat Lentz more harshly than it would similarly-situated black officers.

With respect to the municipal liability, the Court agreed that the jury had sufficient evidence to support the jury's decision that "City policymakers either discriminated against him or ratified a subordinate's decision to do so."

Finally, the Court agreed that Lentz suffered retaliation for his initial complaint. "To establish a prima facie case of retaliation, a plaintiff must demonstrate that: (1) the plaintiff engaged in protected activity; (2) the protected activity was known by the defendant; (3) the defendant took "materially adverse" action against the plaintiff; and (4) the protected activity and adverse action were causally connected."[284] Specifically, Lentz produced evidence that the Safety Director "personally ratified the departmental charges while aware of the EEOC grievance."

After dealing with a number of other issues under appeal and cross-appeal, the Court upheld the verdict against the City, but remanded the case for a retrial on actual damages.

Garner v. City of Cuyahoga Falls, 311 Fed.Appx. 896 (6th Cir. 2009)

FACTS: Garner served as a city inspector and also as a reserve police officer. During a public event, he drew the attention of a vendor to a safety hazard in his area and instructed him to correct the problem. Later that evening, after Garner had returned to the festival grounds in his police uniform, the vendor asked Garner's police commander about his "authority and employment status" and complained Garner was "picking on him." Garner explained his side to the supervisor. He left the grounds for other reasons, and when he returned, he was told to meet with the vendor and another police supervisor. A verbal altercation ensued, with Garner trying to explain the serious nature of the hazard involved. Following this incident, the Mayor allegedly "commended a campaign to terminate him." Various city officials became involved and allegations were made against Garner. Garner was fired on December 18, 2006. Following that time, various citizens allegedly told Garner that they had heard he was "stealing city time."

Garner filed suit and argued that he had not "been afforded an appropriate name-clearing hearing." The federal court ruled in favor of the defendants on federal claims, and refused to exercise state court jurisdiction. Garner appealed.

[283] Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344 (6th Cir. 1998).
[284] Abbott v. Crown Motor Co., Inc., 348 F.3d 537 (6th Cir. 2003)

ISSUE: Is a terminated employee entitled to a name-clearing hearing if they meet the legal criteria for one?

HOLDING: Yes

DISCUSSION: Garner's first allegation was that the defendant city officials "made false and public allegations against Garner that impaired his good name, reputation, honor and integrity and terminated him without a name-clearing hearing." The Court agreed that it "is well established that a person's reputation, good name, honor and integrity are considered liberty interests protected by the due process clause of the Fourteenth Amendment."[285] Further, in the "public employment context, 'where a nontenured employee shows he has been stigmatized by the voluntary, public dissemination of false information in the course of a decision to terminate his employment, the employer is required to afford him an opportunity to clear his name."[286]

> In that respect, Ludwig v. Bd. of Trs. Of Ferris State Univ., instructs that five elements must be satisfied to establish that a plaintiff was deprived of a liberty interest entitling him to a name-clearing hearing:
>
> First, the stigmatizing statements must be made in conjunction with the plaintiff's termination from employment. Second, a plaintiff is not deprived of his liberty interest when the employer has alleged merely improper or inadequate performance, incompetence, neglect of duty or malfeasance …. Third, the stigmatizing statements or charges must be made public. Fourth, the plaintiff must claim that the charges made against him were false. Lastly, the public dissemination must have been voluntary.[287]

In addition, Brown v. City of Niota adds a sixth element: "once a plaintiff has established the existence of all five elements, he is entitled to a name-clearing if he requests one."[288] Failure to make the request is fatal to the case.[289] The Court noted that Garner never specifically asked for a hearing and that therefore he could not argue the lack of the hearing.

The Court also discussed Garner's First Amendment rights, and whether his speech was protected. Looking to Garcetti v. Ceballos," the Court agreed that "a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern" was protected.[290] That decision is up to the court to decide, but further, the Court noted "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[291]

Because Garner's speech was made directly as a result of his professional responsibilities and as such, "not constitutionally protected under the teaching of Garcetti," the trial court's ruling was affirmed.

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[285] Bd. of Regents v. Roth, 408 U.S. 564 (1972); Chilingirian v. Boris, 882 F.2d 200 (6th Cir. 1989).
[286] Burkhart v. Randles, 764 F.2d 1196 (6th Cir. 1985).
[287] 123 F.3d 404 (6th Cir. 1997).
[288] 214 F.3d 718 (6th Cir. 2000).
[289] Quinn v. Shirley, 293 F.3d 315 (6th cir. 2002).
[290] 547 U.S. 410 (2006).
[291] Id.

Luty v. City of Saginaw, 2009 WL 331621 (6th Cir. 2009)

FACTS: During a secret police department supervisors' meeting in 2005, Chief Cliff "voic[ed] his frustration with the council's action" in cutting the budget. A transcript "came to light and was publicized at a subsequent city council meeting." The recording was not authorized. The "transcript accurately reflected [the Chief's] somewhat intemperate comments at the supervisor's meeting, including his references to certain council members as 'idiots' and 'morons'" The unauthorized recording violated the agency's policy, so the chief called another meeting. At that meeting, all of the command staff "agreed to submit to investigative testing in order to clear themselves of participation in the secret taping." The process would be in two phases, with a limited number of the officers to be tested by polygraph. This part of the investigation was "not officially compelled."

Although she initially agreed, Luty later decided not to participate in the testing, including the polygraph. As part of the IA investigation, it was learned that Luty had "secretly tape-recorded conversations with fellow officers on at least two prior occasions" and the policy was created because of these, and possibly other, incidents involving Luty. The IA report indicated that although Luty was the prime suspect in the taping, that because of a lack of direct evidence, they could not be sure. Chief Cliff decided that Luty was, in fact, the perpetrator, and later agreed that he considered her refusal to participate in the testing in reaching that conclusion. The Chief recommended, and the City Manager agreed, to demote her to sergeant for one year.

A year later, Luty was restored to her rank, and several additional incidents arose that led to reprimands and suspension. Luty filed suit, arguing violations the First Amendment and the state workers' disability compensation act. The trial court jury found for the defendants and Luty appealed.

ISSUE: Is a refusal to participate in a process an expressive action protected by the First Amendment?

HOLDING: No

DISCUSSION: Luty complained that the city's "adverse employment action" violated her First Amendment protections. The Court noted that the First Amendment protects "only … conduct that is 'inherently expressive.'" The Court found it "difficult - if not impossible - to detect any particular message emanating from Luty's conduct in refusing to undergo the scan test or polygraph." The Court agreed her conduct did not amount to protected speech. However, even had it been found to be speech, the Court noted that "determining whether a public employer has violated the First Amendment by firing a public employee for engaging in speech," It must first "ascertain whether the relevant speech addressed a matter of public concern."[292] That is decided by the "content, form, and context of a given statement, as revealed by the whole record."[293] The "public concern test" was further refined by the emphasis "that the court must determine the focus, point, purpose and intent of the speech in question or the 'communicative purpose of the speaker."[294]

> Speech is of public concern if it "involves issues about which information is needed or appropriate to enable members of society to make informed decisions about the operation of their government." By contrast, when the employee speech "cannot fairly be considered as relating to any matter of political, social" or community interest, government officials enjoy wide discretion in the management of their offices.

[292] Farhat v. Jopke, 370 F.3d 580 (6th Cir. 2004).
[293] Connick v. Myers, 461 U.S. 138 (1983).
[294] Farhat, supra.

In this case, Luty's "speech" was "of no public concern whatever and, therefore, is not protected by the First Amendment" - relating as it did to an "internal police department matter." Although "some internal police policies may be a legitimate focus of community interest," the Court could not "discern an issue of public concern." As such, it was unnecessary to move on to the "Mount Healthy question."[295]

The jury verdict was upheld.

Wolfe v. Jarnigan, 2009 WL 4885258 (6th Cir. 2009)

FACTS: Wolfe was a Hamblen County (TN) deputy sheriff. He was chief detective until he crashed his car, which put him into a coma. He eventually pled guilty to driving while impaired in the wreck and resigned. He was rehired by Sheriff Purkey as a jail deputy in 2005 and soon asked to go back to patrol status. The Sheriff told him he would have to wait for a year to be considered for that assignment.

In 2006, Jarnigan ran against Purkey, on a platform of eliminating mismanagement and reducing liability, and cited the rehiring of Wolfe as an issue. Jarnigan won the race. Wolfe, of course, openly supported Purkey. After the election, Wolfe tested for a patrol deputy slot, and consistently scored the highest, but the civil service rules allowed the Sheriff to choose between the top five scoring applicants. He did offer to promote Wolfe to jail sergeant if he would take the test, but that would have made him "temporarily ineligible for a patrol position" so he declined. Wolfe claimed that "Jarnigan told him on several occasions that he would have received the promotion but for his support of Purkey in the election." However, despite his alleged attempts to do so, Wolfe was never able to catch this on tape, instead, he did catch on tape that he wasn't being promoted because he "had betrayed the public trust and promoting him would hurt Jarnigan's re-election chances."

Wolfe filed suit under 42 U.S.C. §1983, raising a First Amendment retaliation claim. Jarnigan moved for summary judgment, which was denied. He appealed.

ISSUE: Is it critical to present an affirmative defense in an initial answer to a complaint?

HOLDING: Yes

DISCUSSION: The Court began:

> To prove retaliation, a plaintiff must show (1) that he engaged in protected conduct; (2) that the defendant took an adverse action against the plaint that 'would deter a person of ordinary firmness from continuing to engage' in the protected conduct; and (3) that the adverse action 'was protected at least in part by the plaintiff's protected conduct."[296]

If the plaintiff is successful in overcoming all three hurdles, the burden then shifts to the defendant to "prove the harmlessness of the retaliation." In other words, "even if Jarnigan had an impermissible motive, he would have taken the same adverse action against Wolfe 'in the absence of the protected conduct,'"[297] Jarnigan focused his appeal on the last question. However, he did not present this defense to the trial court - "not in his answer, not in his motion to dismiss, not in his motion for summary judgment." Instead, he "challenged Wolfe's ability to satisfy the third prong of the prima facie case, arguing that Wolfe never showed that Jarnigan's

[295] Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), which involves employment cases.
[296] Sowards v. Loudon County, 203 F.3d 426 (6th Cir. 2000).
[297] Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

promotion decision was motivated in part by Wolfe's support of Purkey." Because it was not raised in the trial court, "Jarnigan forfeited the right to raise it on appeal." The trial court did not have the opportunity to base its decision on the "Mt. Healthy defense." In addition, Jarnigan never formally addressed an issue with a belated affidavit from Wolfe, by asking that it be struck from the record or otherwise not considered. Finally, Jarnigan argued that he could not be sued as an individual "for official acts taken as Hamblen County Sheriff." The Court, however, noted that "Jarnigan is subject to suit under §1983 only because he acted under color of state law, and the critical factor that makes him subject to suit under §1983 cannot simultaneously insulate him from liability."[298]

The Court affirmed the lower court's decision.

Mitchell v. County of Wayne (Michigan), 2009 WL 2192283 (6th Cir. 2009)

FACTS: During the time in question, Mitchell worked for the Wayne County Sheriff's Office on the day shift. On February 22, 2005, Mitchell was told he must take a "random drug test" the following day. (He had taken several such tests during his time with the sheriff's office.) Later that night, Mitchell fell and injured his back. He called the sheriff's office the next morning, at about 0520, and he alleged, told the person who answered that he had a test scheduled for that day and would not be able to be there. (It was unclear whether he stated, specifically, that it was a drug test.) Mitchell did not go to a medical doctor or the ER for his injury, but did visit a chiropractor. He took no prescription medication. While at the chiropractor, Mitchell filled out FMLA paperwork and it was faxed to the Sheriff's Office. He requested three weeks of leave, at the direction of the chiropractor. He later confirmed they had received the paperwork, but did not mention to the personnel officer that he had missed the drug test. (He had taken two other periods of FMLA leave while working for the Sheriff's Office.)

Over the next week, he called the Sheriff's Office every morning, to "advise that he was still on leave." On March 1, he called again, and asked Sgt. Boisvert if he needed to keep doing so, and also mentioned the missed drug test. He was told that he didn't need to keep calling in. On March 7, Commander Kreyger called him, revoked his police powers and wrote him up for missing the test. On March 14, he submitted paperwork for additional FMLA leave until March 23. On March 24, he went to personnel to provide notice that he was ready to return to work. He was told he was not approved to do so, and the next day was summoned to Commander Kreyger's office. He was suspended for failure to appear for the test. He had 24 hours to respond, and he wrote a short memo explaining what had occurred. At the subsequent hearing, he was told that "it just looks suspicious." He was told that he could return to work with an agreement that he was subject to random testing for the next year, to which he agreed. He was also told that "if he returned to work, [they] could place him on any shift … regardless of his seniority rights." He refused to agree and was fired.

Mitchell filed suit. At trial, the two commanding officers denied that they told Mitchell that his schedule was subject to change. Two witnesses testified that the county "did not have a written policy instructing what to do in the event that they had to miss a drug test," that "he would not have believed that the failure to appear for a drug test due to injury would have constituted 'a refusal' to take the test." Both did state, however, that if the person could physically notify that he could not appear for a test, but did not do so, that the failure could be a refusal.

The jury found in favor of the county, and Mitchell appealed.

ISSUE: May a jury accept another, legitimate reason for a termination in a FMLA case?

[298] Hafer v. Melo, 502 U.S. 21 (1991); see also Edelman v. Jordan, 415 U.S. 651 (1974).

HOLDING: Yes

DISCUSSION: The Court reviewed the provisions of FMLA. The Court agreed that it was reasonable for the jury to find Mitchell's claim that he had told "someone" that he missed a test incredible, and that he also ignored several opportunities to specifically tell supervisors that he had missed a drug test. It was also reasonable for the jury to believe Commander Kreyger's claim that the reason for the termination was the failure to follow the order, rather than his use of FMLA.

The Court upheld the jury verdict.

Harris v. Butler County, Ohio (and Sheriff Jones), 2009 WL 2628501 (6th Cir. 2009)

FACTS; Harris was initially hired as a Butler County deputy sheriff in 1999. Apart from a brief 4-month absence, he worked for the sheriff's office through January, 2006. Sheriff Jones took office in January, 2005. Harris was sworn in but did not receive a special commission that would have permitted him to carry a gun and work off-duty jobs.[299] When he was able to ask Jones about it, he allegedly was told that it was because he campaigned for another candidate. Harris denied it, but agreed that he had held one fundraiser for another candidate that was held at his church. Harris did receive the commission several days later. During that same time frame, Harris allegedly associated with a female ex-prisoner, in violation of agency policy. Harris was called in and told that he could either resign or be terminated. Harris chose to resign.

Harris filed suit for unlawful termination, and the trial court gave summary judgment to the Sheriff's office. Harris then appealed.

ISSUE: May a deputy be terminated for an action in violation of a sheriff's office policy (when it is alleged that the termination is also for their political activity against the sheriff)?

HOLDING: Yes

DISCUSSION: The Court noted that:

> A plaintiff must establish three elements for a claim of employment-based retaliation: first, that the employee 'engaged in protected conduct'; second, that 'an adverse action was taken against the [employee] that would deter a person of ordinary firmness from continuing to engage in the conduct'; and third, that 'the adverse action was motivated at least in part of the [employee's] protected conduct"[300] Only if the plaintiff makes meets all three prongs will the burden shift to the employer to show that he would have made the same decision in the absence of the protected conduct to be entitled to prevail on summary judgment.

The Court agreed that the "right of political association is well established as falling within the core of activities protected by the First Amendment."[301] The evidence before the court suggested that Harris had engaged in political activity adverse to Jones and thus satisfied the first prong of the analysis. Second, the Court reviewed whether Harris was materially affected by Jones - and the Court concluded that the brief delay (10 days) in getting the special commission did not materially affect Harris. With respect to the "effective termination," a

[299] In Ohio, some deputies work only the jail, and do not necessarily have permission to carry a firearm.
[300] Thaddeus-X v. Blatter, 175 F.3d 378 (6th Cir. 1999).
[301] Sowards v. Loudon County, 203 F.3d 426 (6th Cir. 2000).

forced resignation, the Court found that it was unnecessary to explore that issue because Harris failed to meet the third prong. The Court found there was insufficient causal connection between the resignation and his "lack of political support for Sheriff Jones." Harris admitted "violating the associations policy and knew that a violation of the associations policy would result in termination."

The Court upheld the summary judgment in favor of the Sheriff.

Hance v. Norfolk Southern, 571 F.3rd 511 (6th Cir. 2009)

FACTS:` Hance was an employee of the Norfolk Southern. He was terminated by the railroad and asserted it was because of his responsibilities to the Tennessee National Guard (TNG). During his time with the railroad, he was transferred. He was eventually released for having an "unacceptable work record," although he had never been disciplined. During the appeal process, he was told that one of the supervisors (who were named in the lawsuit) "was upset with Hance because Hance was off too much time from work with military service." Hance was brought back to the railroad. When he reported, he brought with him a member of the TNG, who explained that Hance was due to report for summer drill two days later. The meeting was hostile, and eventually, the TNG Master Sergeant was forced to leave. The supervisor ordered Hance to report to another location (in another state) the day following his scheduled return for possible work, but he was not guaranteed work there. Hance reported the situation to a railroad executive and was told he didn't have to follow that order. As a result, he did not report. Hance also stated that he was actually ineligible to work at that time, as he had not yet had a required medical examination. (The railroad disputes this, stating that he was still required to report.)

Hance was charged with insubordination and terminated. Hance appealed to the U.S. District Court, which found that although his termination was not based on his military service or status alone, it was a motivating factor and that he thus made a prima facie case of discrimination under USERRA. He was ordered to be reinstated and awarded damages of approximately $350,000. The railroad appealed.

ISSUE: Is adverse employment action prohibited if the employee's military status is a motivating factor in the decision, albeit not the only factor?

HOLDING: Yes

DISCUSSION: The Court reviewed the provisions of USERRA and noted that "adverse employment actions are prohibited" if a subject's military service is a motivating factor, unless the employer can prove that the action would have been taken anyway.[302] The railroad argued that Webster lacked the authority to investigate or terminate Hance, and thus his "anti-military animus cannot be imputed to the company." The Court noted, however, that Webster was not the only NS supervisor that indicated concern about Hance's deployments, and one of those individuals did make the decision to terminate Hance. The Court agreed it was proper to attribute the animus to the company.

The Court agreed that the railroad had "failed to demonstrate a valid nondiscriminatory basis for Hance's dismissal," and upheld the decision.

[302] 38 U.S.C. §4311(c)(1).

DISCIPLINE

U.S. v. Williams, 2009 WL 579332 (6th Cir. 2009)

FACTS: Williams was a Nashville PD officer on April 30, 2003. On that date, Officer Cecil (Nashville PD) asked Williams to assist him in arresting a drug dealer. Before making a traffic stop, however, Cecil told Williams that he "intended to steal drugs from the drug dealer, not arrest him." Williams "protested, but did nothing to stop Officer Cecil and did not report the theft." A year and a half later, in late 2004, Nashville PD received information about the theft and opened an internal investigation. Williams was interviewed on April 13, 2005. He admitted the traffic stop, but stated that they'd searched the car and the subject, and found neither money nor guns. "Shortly thereafter, however, [Williams] went to [IA], recanted his story, and told the truth – or at least got closer to telling the truth." The DEA become involved and Williams "gave inconsistent statements to DEA agents as well," telling them initially that Cecil told him after the fact. He admitted the truth after failing a polygraph.

Williams was indicted on several counts and moved for suppression. He moved for suppression and was denied. He was eventually convicted only of misprision of a felony. He appealed.

ISSUE: Does the Fifth Amendment protect an employee when they lie?

HOLDING: No

DISCUSSION: Williams argued that the "Fifth Amendment gave him the right to refrain from reporting it." The Court noted, however, that his conviction "did not stem from his silence." "Instead, [Williams] was convicted because when he chose to speak he lied to the authorities."[303] Williams also tried to raise a Garrity issue, but because he failed to raise the issue at the trial level, the Court declined to consider it.

Williams' conviction was affirmed.

[303] Brogan v. U.S., 522 U.S. 398 (1998); U.S. v. Apfelbaum, 445 U.S. 115 (1980).

2009-10
United States Supreme Court

Michigan v. Fisher, 130 S.Ct. 546 (2009), Decided December 7, 2009

FACTS: On the day in question, Brownstown, Michigan police officers "responded to a complaint of a disturbance." They were directed to a residence "where a man was 'going crazy.'" When they arrived, they "found a household in considerable chaos: a pickup truck in the driveway with its front smashed, damaged fenceposts along the side of the property, and three broken house windows, the glass still on the ground outside."

The officers also saw 'blood on the hood of the pickup and on clothes inside of it, as well as on one of the doors to the house." (There was some dispute as to exactly when they saw the blood, but it was not disputed that they noticed it before they entered the house.) Looking through the window, they saw Fisher "inside the house, screaming and throwing things." The back door was locked and the front door was blocked by a couch. The officers knocked, but Fisher refused to answer or open the door. They could see that he had cut his hand and asked if he needed medical care. "Fisher ignored these questions and demanded, with accompanying profanity, that the officer go to get a search warrant." Officer Goolsby attempted to enter through the front door, but when he saw Fisher "pointing a long gun at him," he retreated.

Fisher was eventually apprehended and charged under state law with assault with a dangerous weapon and possession of a firearm during the commission of a felony. The trial court "concluded that Officer Goolsby violated the Fourth Amendment when he entered Fisher's house" and agreed to suppress the evidence of Fisher's possession of the weapon. The case wended its way through the state courts, which upheld the suppression. Michigan appealed.

ISSUE: May officers make a warrantless entry into a residence when there is an objective reason to believe that an occupant needs medical assistance or may be putting someone else in harm's way?

HOLDING: Yes

DISCUSSION: The Court began its opinion, stating "[t]he ultimate touchstone of the Fourth Amendment … is reasonableness." Although "searches and seizures inside a home without a warrant are presumptively unreasonable, that presumption can be overcome." "For example, 'the exigencies of the situation [may] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable.'"[304] Brigham City v. Stuart[305] "identified one such exigency," the need to assist with injured persons inside a home. "This 'emergency aid exception' does not depend on the officers' subjective intent or the seriousness of any crime they are investigating when the emergency arises.' It requires only 'an objectively reasonable basis for believing,' that a person within [the house] is in need of immediate aid."

The court found that a "straightforward application of the emergency aid exception, as in Brigham City, dictates that the officer's entry was reasonable." When the officers arrived, they "encountered a tumultuous situation in the house - and … found signs of a recent injury, perhaps from a car accident, outside." It was reasonable to

[304] Mincey v. Arizona, 437 U.S. 385 (1978).
[305] 547 U.S. 398 (2006).

believe that Fisher's actions in throwing projectiles might harm someone else inside the house, or that he might hurt himself in the "course of his rage."

Specifically, and in contravention to the opinion of the Michigan state courts, The Supreme Court noted that "[o]fficers do not need ironclad proof of 'a likely serious, life-threatening' injury to invoke the emergency aid exception." In Brigham City, the only injury noted was a cut lip. The Court also dismissed Fisher's assertion that the officers could not have believed he needed medical help since they never summoned medical assistance, stating that the test was not the officer's subjective belief, but whether they had an objective basis for believing that either he needed medical help, or that other persons were in danger.

The Court concluded:

> It was error for the Michigan Court of Appeals to replace that objective inquiry into appearances with its hindsight determination that there was in fact no emergency. It does not meet the needs of law enforcement or the demands of public safety to require officers to walk away from a situation like the one they encountered here. Only when an apparent threat has become an actual harm can officers rule out innocuous explanations for ominous circumstances. But, '[t]he role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties.'[306] It sufficed to invoke the emergency aid exception that it was reasonable to believe that Fisher had hurt himself (albeit nonfatally) and needed treatment that in his rage he was unable to provide, or that Fisher was about to hurt, or had already hurt, someone else. The Michigan Court of Appeals required more than what the Fourth Amendment demands."

The Court reversed the decision to suppress the evidence and remanded the case to Michigan for further proceedings.

FULL TEXT OF OPINION: **http://www.supremecourtus.gov/opinions/09pdf/09-91.pdf**

Presley v. Georgia, 130 S.Ct. 721 (2010), Decided January 19, 2010

FACTS: Presley was scheduled to stand trial in DeKalb County, Georgia. During jury selection the judge "noticed a lone courtroom observer." The judge "explained the prospective juror were about to enter and instructed the man that he was not allowed in the courtroom, and had to leave that floor of the courthouse entirely." The Court discovered that he was Presley's uncle. Upon objection by Presley's attorney, the judge explained that the courtroom would be fully occupied by jurors, and that the "uncle cannot sit and intermingle with members of the jury panel." The judge did state that the uncle could return when the trial actually started.

Presley was convicted, and moved for a new trial "based on the exclusion of the public from the juror *voir dire*." He presented evidence that there would have been plenty of space for observers. The trial court denied it, and Presley appealed. The Georgia Court of Appeals upheld the trial court's decision, as did the Georgia Supreme Court.

Presley appealed to the U.S. Supreme Court, which accepted the case.

ISSUE: May a judge exclude observers from jury selection?

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[306] Id.

HOLDING: No (but see discussion)

DISCUSSION: The Court first noted that the question before it is "whether the right to a public trial in criminal cases extends to the jury selection phase of trial, and in particular the *voir dire* of prospective jurors." The Court noted that question was addressed in the affirmative, in the First Amendment context, by Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty.[307] A later case, in the same term, ruled that the "Sixth Amendment right to a public trial extends beyond the actual proof at trial, and included a "pretrial hearing on a motion to suppress certain evidence."[308]

The Court concluded the point of whether the public is entitled to observe voir dire was "well settled" and that the defendant had a constitutional right to insist upon it. The Court agreed that there might be, on occasion, an exception to that rule, but that "such circumstances will be rare … and the balance of interests must be struck with special care." Further, the Court noted, it had held that "the trial court must consider reasonable alternatives to closing the proceeding," and emphasized that it is not the responsibility of the parties to offer up such alternatives. The Court noted that the "public has a right to be present whether or not any party has asserted the right."

Specifically, the Court stated, "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." The record indicated that the trial court could have easily accommodated observers, and that the jury could have been instructed "not to engage or interact with audience members."

The decision of the Georgia Supreme Court was reversed and the case remanded.

FULL TEXT OF OPINION: **http://www.supremecourtus.gov/opinions/09p**

Wilkins v. Gaddy, 130 S.Ct. 1175 (2010), Decided February 22, 2010

FACTS: In March, 2008, Wilkins, a North Carolina prison inmate, sued, claiming that the year before, he had been "'maliciously and sadistically' assaulted '[w]ithout any provocation' by a corrections officer," Gaddy. Gaddy was "apparently angered by Wilkins' request for a grievance form" and allegedly "snatched [Wilkins] off the ground and slammed him onto the concrete floor" and then "proceeded to punch, kick, knee and choke [Wilkins] until another officer had to physically remove him from [Wilkins]." He claimed a number of physical and psychological complaints as a result of the assault, but later review by the trial court suggested that some of his physical complaints, such as high blood pressure and mental health issues, were as a result of pre-existing conditions. The lower court did state that he had been X-rayed for a bruised heel, but 'note[d] that bruising is generally considered a *de minimus*[309] *[sic]* injury." His complaints of back pain and headaches where also considered *de minimis*. His case was dismissed by the U.S. District Court and he was also denied leave to amend his complaint, and the Fourth Circuit Court of Appeals upheld the dismissal. Wilkins then petitioned the U.S. Supreme Court for certiorari, which it granted.

ISSUE: May a prisoner sue under the Eighth Amendment for a minor injury when the use of force is allegedly done for improper reasons?

HOLDING: Yes

[307] 464 U.S. 501 (1984)
[308] Waller v. Georgia, 467 U.S. 39 (1984).
[309] Minor.

DISCUSSION: The Court began by noting that the appellate courts have "strayed from the clear holding of [the U.S. Supreme Court]" in Hudson v. McMillian.[310] In that case, the Court had stated that "requiring what amounts to a showing of significant injury in order to state an excessive force claim" is improper in an Eighth Amendment case. Instead, the Court had ruled that the primary question is "not whether a certain quantum of injury was sustained, but rather 'whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."[311]

However, the Court agreed that the "absence of serious injury" is still relevant to an "Eighth Amendment inquiry," as the "extent of injury may also provide some indication of the amount of force applied." As an example, "an inmate who complains of a 'push or shove' that causes no discernible injury almost certainly fails to state a valid excessive force claim."

But, the Court continued:

> Injury and force, however, are only imperfectly correlated, and it is the latter that ultimately counts. An inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury.

The Court, in Hudson, had "aimed to shift the 'core judicial injury' from the extent of the injury to the nature of the force - specifically, whether it was non-trivial and 'was applied … maliciously and sadistically to cause harm.'"

The Court found it improper to have dismissed Wilkins' complaint for this reason and reversed that decision. The Court however, "express[ed] no view on the underlying merits of his excessive force claim" and noted that was still for Wilkins to prove.

NOTE: *Although most use of force cases involving law enforcement officers are pre-custody cases and tried under the Fourth Amendment, officers who handle prisoners might also be subject to the Eighth Amendment's prohibition against "cruel and unusual punishment."*

FULL TEXT OF OPINION: http://www.supremecourtus.gov/opinions/09pdf/08-10914.pdf

Florida v. Powell, 130 S.Ct. 1195 (2010), Decided February 23, 2010

FACTS: On August 10, 2004 Tampa, Florida, police officers were in search of Powell. They entered his girlfriend's apartment and found him coming from a bedroom. They searched the room and found a loaded handgun under the bed. Powell was arrested and transported. "Once there, and before asking Powell any questions, the officers read Powell the standard Tampa Police Department Consent and Release Form 310."

The form read as follows:

> You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without

[310] 503 U.S. 1 (1992)
[311] Whitley v. Albers, 475 U.S. 412 (1986).

> cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

Powell acknowledged the rights, agreed to talk and signed the form. He admitted he owned the gun and that he knew he was prohibited from gun possession, since he was a convicted felon. He was charged in Florida for the offense. At the trial court level, he moved for suppression of "his inculpatory statements," arguing that "the Miranda[312] warnings were deficient because they did not adequately convey his right to the presence of an attorney during question. The trial court denied the motion and he was subsequently convicted.

The Florida state appellate court, however, reversed the conviction, finding that the Miranda warnings were inadequate and that the statements should have been suppressed. The Florida Supreme Court agreed, finding that "advice Powell received was misleading because it suggested that Powell could 'only consult with an attorney before questioning; and did not convey Powell's entitlement to counsel's presence throughout the interrogation."

Florida requested certiorari, and the U.S. Supreme Court agreed to review the case.

ISSUE: Must a suspect be expressly advised of his right to counsel *during* custodial interrogation?

HOLDING: No (but see discussion)

DISCUSSION: The Court first addressed whether it had jurisdiction to hear the case, as Powell argued that it was based upon Florida law, not federal law. The Court, however, noted that "the "Florida Supreme Court treated state and federal law as interchangeable and interwoven; the court at no point expressly asserted that state-law sources gave Powell rights distinct from, or broader than, those delineated in Miranda."[313]

The Court moved to the certified question - "whether the advice Tampa police gave to Powell 'vitiate[d] Miranda.'" The Court reviewed the principles of Miranda, which established "certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation."[314]

The Court continued:

> Miranda prescribed the following four now-familiar warnings:
>
> [A suspect] must be warned prior to any questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

In this case, the third warning was the only one at issue. The Court agreed that although the "four warnings Miranda requires are invariable, .. the Court has not dictated the words in which the essential information must be conveyed."[315] The Court had agreed that "reviewing courts are not required to examine the words

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[312] Miranda v. Arizona, 384 U.S. 436 (1966)
[313] See Michigan v. Long, 463 U.S. 1032 (1983).
[314] Duckworth v. Eagan, 492 U.S. 195 (1989).
[315] California v. Prysock, 453 U.S. 355 (1981).

employed 'as if construing a will or defining the terms of an easement.' The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by Miranda."[316]

The Court looked to Duckworth and Prysock for guidance, and concluded that the warnings given in this case, in their totality, satisfied Miranda. Read in combination, the "first statement communicated that Powell could consult with a lawyer before answering any particular question, and the second statement confirmed that he could exercise that right while the interrogation was underway." As such, Powell's right to have an attorney present at all times was "reasonably conveyed." Powell argued that most jurisdictions, both in Florida and across the United States, did "expressly advise suspects of the right to have counsel present both before and during interrogation." The Court lauded the "standard warnings" used by the FBI, describing them as "exemplary," but declined "to declare its precise formulation necessary to meet Miranda's requirements."

The Court concluded:

> Different words were used in the advice Powell received, but they communicated the same essential message.

The Florida Supreme Court decision was reversed, and the case remanded for further proceedings.

FULL TEXT OF OPINION:http://www.supremecourtus.gov/opinions/09pdf/08-1175.pdf

Maryland v. Shatzer, 130 S.Ct. 1213 (2010), Decided February 24, 2010

FACTS: In August, 2003, a social worker for the Hagerstown Police Department learned of allegations that Shatzer has sexually abused his 3-year-old son. At the time, he was incarcerated for an unrelated child sexual abuse offense. Det. Blankenship interviewed Shatzer at the prison, after reviewing Shatzer's Miranda rights with him. Shatzer gave him a written waiver of those rights. However, when Blankenship explained why he was there, "Shatzer expressed confusion - he had thought Blankenship was an attorney there to discuss the prior crime for which he was incarcerated." At that time, Shatzer refused to talk to him without an attorney. Blankenship ended the session and returned Shatzer "back into the general prison population." Blankenship then closed the investigation.

Two and a half years later, the same social worker provided more specific allegations to the department. Det. Hoover was assigned, and they interviewed the victim, who was by that time eight years old. The victim provided more detailed information. They went to the prison where Shatzer had been transferred to interview him. Shatzer was again surprised, as "he thought the investigation had been closed, but Hoover explained they had opened a new file." He was again given Miranda. Once again, he gave a written waiver.

Hoover interrogated Shatzer for a half-hour, during which Shatzer admitted non-contact sexual actions in front of the child. He agreed to take a polygraph, and at no time did "Shatzer request to speak with an attorney or refer to his prior refusal to answer questions without one."

Shatzer took the polygraph five days later, after again giving a written waiver to his Miranda rights. When he was judged to have failed, he "became upset, started to cry and incriminated himself by saying ' I didn't force him. I didn't force him.'" He then requested an attorney. "Hoover promptly ended the interrogation."

[316] Duckworth, supra.

Shatzer was charged with several offenses relating to the incident and he moved for suppression. The trial court denied the motion. Shatzer was tried and convicted. He appealed and the Maryland Court of Appeals reversed the conviction. Maryland appealed to the U.S. Supreme Court, which granted certiorari.

ISSUE: Is the Edwards v. Arizona[317] prohibition against interrogation of a suspect who has invoked the Fifth Amendment right to counsel inapplicable if, after the suspect asks for counsel, there is a break in custody or a substantial lapse in time (more than two years and six months) before commencing reinterrogation pursuant to Miranda?

HOLDING: Yes

DISCUSSION: The Court reviewed the history of both the decision in Miranda v. Arizona[318] and Edwards v. Arizona. Miranda had instructed that officers "must warn a suspect prior to questioning that he has a right to remain silent, and a right to the presence of an attorney" in order to counteract the "coercive pressure" inherent in a custodial interrogation. If the suspect then indicates that he wishes to remain silent, or would like an attorney, the interrogation must then cease. "Critically, however, a suspect can waive these rights." A valid waiver request a showing that the "waiver was knowing, intelligent, and voluntary" under a high standard of proof laid out by Johnson v. Zerbst[319] for constitutional rights.

In the Edwards case, the Court had determined that "Zerbst's traditional standard for waiver was not sufficient to project a suspect's right to have counsel present at a subsequent interrogation if he had previously requested counsel," concluding that instead, "'additional safeguards' were necessary." In McNeil v. Wisconsin, the Court had found it insufficient that the suspect had simply "responded to further police-initiated custodial interrogation."[320] Specifically, although a general waiver might be sufficient to an initial Miranda warning, it was "not sufficient at the time of subsequent attempts if the suspect initially requested the presence of counsel." The Court had noted in other cases that there was a risk of increasing pressure to talk as the custody is prolonged.[321] In effect, earlier Courts were concerned about the possibility of a suspect being "badgered in submission" by repeated attempts at interrogation after invocation of the right to counsel.[322]

However, in this case, unlike the earlier cases on the issue, Shatzer was not held in continuous custody by the interrogating officers, but had instead been released back to serve his initial incarceration. There, he stayed for two and a half years before further interrogation was attempted.

The Court continued:

> When, unlike what happened in these three cases, a suspect has been released from his pretrial custody and has returned to his normal life for some time before the later attempted interrogation, there is little reason to think that his change of heart regarding interrogation without counsel has been coerced. He has no longer been isolated. He has likely been able to seek advice from an attorney, family members, and friends. And he knows from his earlier experience that he need only demand counsel to bring the interrogation to a halt; and that investigative custody does not last indefinitely. In these circumstances, it is far fetched to think that a police officer's asking the suspect whether he would like to waive his Miranda rights will

[317] 451 U.S. 477 (1981)
[318] 384 U.S. 436 (1966)
[319] 304 U.S. 458 (1938)
[320] 501 U.S. 171 (1991)
[321] See Minnick v. Mississippi, 498 U.S. 146 (1990).
[322] See Arizona v. Roberson, 486 U.S. 675 (1988).

any more "wear down the accused,"[323]) than did the first such request at the original attempted interrogation—which is of course not deemed coercive.

The Court noted that without some time limit, the disability caused by Edwards would be eternal. It would apply, under Roberson, "when the subsequent interrogation pertains to a different crime," under Minnick "when it is conducted by a different law enforcement officer" and even after the subject has met with an attorney. It would also "render invalid … confessions invited and obtained from suspect who (unbeknownst to the interrogators) have acquired Edwards immunity previously in connection with any offense in any jurisdiction." The Court noted that "[i]n a country that harbors a large number of repeat offenders, this consequence is disastrous."

The Court concluded that the protections offered by the Miranda warnings, which of course will be given at the second attempt at interrogation under custodial circumstances, will suffice when the subject "is reinterrogated after a break in custody that is of sufficient duration to dissipate its coercive effects."

The Court further agreed that although Shatzer was still incarcerated, that his return to the general prison population was, in fact, a break in custody. The issue remained, however, that if two and one half year was a sufficient break in custody, how much less would still meet that requirement. The Court found it "impractical to leave the answer to that question for clarification in future case-by-case adjudication; law enforcement officers need to know, with certainty and beforehand, when renewed interrogation is lawful." Although it was "certainly unusual" for at Court to "set forth precise time limits governing police action," there was precedent for doing so. The Court ruled that a period of fourteen days was "plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody."

The Court briefly addressed the concern that Shatzer remained incarcerated during that break in custody - by differentiating between "Miranda custody and incarceration pursuant to conviction." The Court noted that "'the inherently compelling pressures' of custodial interrogation ended when he returned to his normal life" albeit in prison.

The Court concluded that "because Shatzer experienced a break in Miranda custody lasting more than two weeks between the first and second attempts at interrogation, Edwards does not mandate suppression of his March 2006 statements. The Court reversed the Maryland Court of Appeals and remanded the case for further proceedings.

FULL TEXT OF OPINION: http://www.supremecourtus.gov/opinions/09pdf/08-680.pdf

Johnson v. U.S., 130 S.Ct. 1265 (2010), Decided March 2, 2010

FACTS: Johnson pled guilty in Florida to the federal charge of "knowingly possessing ammunition after having been convicted of a felony." Because he was a repeat offender, the prosecution sought an enhanced penalty, claiming that he had 3 prior convictions for a violent felony. He agreed that 2 of the 3 previous offenses were violent felonies, but argued that the third, for simple battery, would have normally been a misdemeanor, but for the fact he had been previously convicted of a misdemeanor battery. Simple battery under Florida law could be proved "in one of three ways," and it was unclear from the record under which provision Johnson had actually been convicted. The trial court and ultimately the Eleventh Circuit affirmed his conviction. Johnson requested and was granted certiorari by the U.S. Supreme Court.

[323] Smith v. Illinois, 469 U. S. 91, 98 (1984)

ISSUE: Is a simple battery (in Kentucky, an Assault in the Fourth Degree), that has been escalated to a felony by virtue of being a second offense, a "violent felony" for federal repeat offender sentencing?

HOLDING: No

DISCUSSION: The Court reviewed both the federal mandatory-minimum sentencing provisions, as well as the similar provisions under Florida law. The Court noted the "physical force" under federal law was not bound by its definition under Florida law. The Court further stated that physical force under Florida's battery law involved "any intentional physical contact, no matter how slight." The Court expounded at length on the multiple possible definitions of the word "force." In this situation, since what was at issue was whether what had occurred was a "violent felony" - it was clear that in that context, "the phrase 'physical force' means *violent* force - that is, force capable of causing pain or injury to another person." Although the penalties available for battery have shifted over the years, simple battery "whether of the mere-touching or bodily-injury variety," has generally been classified as a misdemeanor. Further, statutory construction finds it questionable that Congress intended that "intentional, unwanted touching" without injury be considered a violent felony for purposes of the enhancement.

The court agreed, as the Government contended, "that in many cases state and local records from battery convictions will be incomplete." However, such "absence of records will often frustrate application of the modified categorical approach - not just to battery but to many other crimes as well."

The U.S. Supreme Court reversed the decision of the Eleventh Circuit decision and set aside Johnson's sentence.

FULL TEXT OF OPINION: **http://www.supremecourtus.gov/opinions/09pdf/08-6925.pdf**

Bloate v. U.S., 130 S.Ct. 1345 (2010), Decided March 8, 2010

FACTS: On August 24, 2006, Bloate was indicted in federal court on firearms and drug charges. (The details of his criminal case are immaterial to this summary.) That indictment started the 70-day clock under the Speedy Trial Act. Various pretrial motions were made, and the deadline to file such motions was extended until September 25. At that time, Bloate indicated he did not wish to file any additional pretrial motions. On October 4, the judge held a hearing to consider Bloate's waiver, and concluded it was voluntary and intelligent.

Over the ensuing three months, Bloate's trial was delayed for several reasons, some at his own instigation. In one instance, he fired his attorney and obtained new counsel. Finally, on February 19, 2007, 179 days after the indictment, Bloate moved to dismiss the case, arguing that the speedy trial provision required it. At that time, the judge considered that approximately 30 days did not count, and apparently dismissed the motion. In late February, due to the rescheduling of another case, Bloate's trial was moved to March 5. At that time, he was tried, and convicted, following a two day trial.

Bloate appealed to the Eight Circuit Court of Appeals, which affirmed the denial of his motion to dismissal. The appellate court ruled that "pretrial motion preparation time" is "automatically excludable." This put the Eighth Circuit in agreement with seven other Courts of Appeal that interpreted that relevant portion of the Speedy Trial Act the same way. (Notably, the Sixth Circuit, however, was on the opposite side.)

Bloate requested certiorari, and the U.S. Supreme Court agreed to hear the appeal.

ISSUE: May delays due to pretrial motions be automatically excluded from the 70-day Speedy Trial provisions?

HOLDING: No (but see discussion)

DISCUSSION: The Speedy Trial Act requires that trial be held within 70 days of indictment, but excludes from the calculation "days lost to certain types of delay" as indicated in the statute. The subsection in question "any period of delay resulting from other proceedings concerning the defendant" - a list of eight subcategories. In this case, the delay at issue was granted to allow Bloate to file pretrial motions - a period of approximately 30 days. The Court noted that the subparagraph in question "does not subject all pretrial motion-related delay to automatic exclusion." The only period that was automatically excludable was the period from the filing of the motion to the conclusion of the hearing. The Court discussed at length the procedural issues involved in this case, and required that a trial judge make specific and detailed findings when a case would go beyond the 70-day rule.

In this case, Bloate "instigated all of the pretrial delays except for the final continuance from February 26 to March 5. The trial judge "diligently endeavored to accommodate" Bloate's requests. Despite the concern that limiting automatic exclusions would "trap" judges who had to balance the desires of the defendant against the ticking clock, the Court noted that "trial judges always have to devote time to assessing whether the reasons for the delay are justified, given both the statutory and constitutional requirement of speedy trials." The Court did not find that "placing these reasons in the record" did not "add an appreciable burden on these judges." Further, the Court noted, even if the case was dismissed, it could be dismissed without prejudice, allowing the prosecution to refile the charges.

The Court ruled that the 28-day period was not automatically excludable, but noted that the appellate court did not address whether any other subsection of the Speedy Trial Act would have justified the exclusion The Court remanded the case to the Eighth Circuit for further proceedings on the matter.

FULL TEXT OF OPINION: http://www.supremecourt.gov/opinions/09pdf/08-728.pdf

NOTE: *Although this case does not directly involve law enforcement, it is summarized to illustrate the need for the Court to move in an expeditious manner once an indictment is returned on a criminal defendant in federal court.*

Padilla v. Kentucky, 130 S.Ct. 1473 (2010), Decided March 31, 2010

FACTS: Padilla, a citizen of Honduras but a lawful permanent resident of the U.S. for over 40 years, pled guilty in Kentucky to transporting a large amount of marijuana. Following his plea, however, he learned that under federal law, his deportation to Honduras was "virtually mandatory." He alleged, in a post-conviction appeal, that he would have insisted on a trial had his attorney advised him of this fact.

The Supreme Court of Kentucky denied his case, and he further appealed to the U.S. Supreme Court, which accepted certiorari.

ISSUE: Is a noncitizen criminal defendant entitled to advice concerning the risk of deportation?

HOLDING Yes

DISCUSSION: The Court reviewed the evolution of federal immigration law, noting that "while once there was only a narrow class of deportable offenses" and judges had broad discretionary authority over the process. Now, however, the classes of deportable offenses have broadened tremendously, and the sentencing judge has been stripped of the authority to give a "judicial recommendation against deportation" - a JRAD - which was almost always respected by the federal decisionmaking authority. In 1990, however, the ability to issue a JRAD was eliminated, and in 1996, congress almost eliminated the ability of the Attorney General to grant discretionary relief from deportation.

These changes have "dramatically raised the stakes of a noncitizen's criminal conviction" and has increased the importance of complete and accurate legal advice. The possibility of deportation is an integral part of the penalty, and is often the most important part.

As previous decisions have stated, criminal defendants are entitled to effective representation and advice by competent counsel.[324] Although matters collateral consequences to conviction have been held not to require advice, the Court noted that it had never actually "applied a distinction between direct and collateral consequences" in a Strickland evaluation.[325] Further, it agreed that "deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or collateral consequence." The Court concluded that Strickland does apply to Padilla's claim.

The Court agreed that trial counsel must inform a noncitizen client whether their plea carries a risk that they will be deported. The Court further agreed that Padilla had "sufficiently alleged that his counsel was constitutionally deficient" by not doing so. The Court reversed Padilla's plea and remanded the case back to Kentucky for further proceedings.

FULL TEXT OF OPINION: **http://www.supremecourt.gov/opinions/09pdf/08-651.pdf**

Berghuis (Warden) v. Smith, 130 S.Ct. 1382 (2010), Decided March 30, 2010

FACTS: Smith was tried for a murder in Grand Rapids, Michigan. Jury selection (voir dire) took place in September, 1993 and included a panel of up to 100 individuals. Only three, however, were African-American. Smith objected unsuccessfully at that time to the composition of the venire panel. However, his case proceeded to trial and he was convicted of second-degree murder.

Smith appealed. The Michigan appellate court ordered the trial court to "conduct an evidentiary hearing on Smith's fair-cross-section claim." Smith's evidence showed that Grand Rapids had approximately an 85% population of African-American. Evidence was presented as to how potential jury members were selected and notified. Specifically, the district court misdemeanor panels were filled first, and remaining potential jurors were made available for felony trial juries. Following Smith's trial, the court administrator reversed the process, as he believed that the district court "essentially swallowed up most of the minority jurors" - leaving the Circuit (felony) Court with a jury pool that was not representative of the entire county. The trial court considered the ways the measurements of underrepresentation could be done, and the resulting statistics convinced the trial court that "African-Americans were underrepresented in Circuit Court venires. The trial court, however, found that Smith did not successfully prove that the process itself "had systematically excluded African-Americans." Upon further action, the Court of Appeals, however, reversed the trial court decision and ordered a new trial, with jurors selected in the way implemented after Smith's first trial. The prosecution

[324] See McMann v. Richardson, 397 U.S. 759 (1970).
[325] Strickland v. Washington, 466 U.S. 668 (1984).

appealed, and the Michigan Supreme Court reversed the Court of Appeals decision, finding that Smith had not met his burden of establishing a "prima facie violation of the Sixth Amendment fair-cross-section requirement."

Smith then filed for habeas relief in the U.S. District Court, reasserting his claim. The District Court dismissed that claim, and he then appealed the Sixth Circuit. The Sixth Circuit found that the "juror-assignment order in effect when Smith's jury was empaneled significantly reduced the number of African-Americans available for Circuit Court venires." In addition, the Sixth Circuit found that Michigan's high court " had unreasonably applied Duren v. Missouri[326] when it declared that social and economic factors could not establish systematic exclusion." As a result, Michigan petitioned for certiorari, which was granted.

ISSUE: May statistical underrepresentation of a minority in a jury pool result in challenge to the ultimate verdict?

HOLDING: Yes (but see discussion)

DISCUSSION: The state argued that there was no "systematic exclusion of African Americans from juries in Kent County, Michigan."

The Court reviewed its prior decisions, particularly Duren, and noted that "a defendant must prove that: (1) a group qualifying as 'distinctive' (2) is not fairly and reasonably represented in jury venires, and (3) 'systematic exclusion' in the jury-selection process accounts for the underrepresentation."

The Court began by stating:

> Each test is imperfect. Absolute disparity and comparative disparity measurements, courts have recognized, can be misleading when, as here, "members of the distinctive group comp[ose] [only] a small percentage of those eligible for jury service.

The Michigan Court had concluded that since no single method was in itself appropriate, it was necessary to consider the results of all three possible ways to look at the evidence. The Sixth Circuit, in contrast, had declared that only the "comparative disparity test" is appropriate to "measure underrepresentation."

The Court continued:

> Evidence that African-Americans were underrepresented on the Circuit Court's venires in significantly higher percentages than on the Grand Rapids District Court's could have indicated that the assignment order made a critical difference. But, as the Michigan Supreme Court noted, Smith adduced no evidence to that effect.

Smith made no effort to compare, for example, how the representation in Kent County differed for the federal court jury venires for the same area. "Smith's best evidence of systematic exclusion was offered by his statistics expert, who reported a decline in comparative underrepresentation, from 18 to 15.1%, after Kent County reversed the assignment order." That evidence was not such a "big change" such as sufficient to support Smith's claim that the prior method had resulted in the underrepresentation.

Smith provided to the Court a "laundry list" of practices that contributed to the underrepresentation, including "the County's practice of excusing people who merely alleged hardship or simply failed to show up for jury

[326] 439 U. S. 357 (1979)

service, its reliance on mail notices, its failure to follow up on nonresponses, its use of residential addresses at least 15 months old, and the refusal of Kent County police to enforce court orders for the appearance of prospective jurors." The Court, however, found no precedent to support that simply "pointing to a host of factors that, individually or in combination, *might* contribute to a group's underrepresentation."

The Court concluded that the Michigan Supreme Court decision was correct and rejected Smith's claim. The case was then remanded to Michigan for further proceedings.

FULL TEXT OF OPINION: **http://www.supremecourt.gov/opinions/09pdf/08-1402.pdf**

U.S. v. Stevens, 130 S.Ct. 1577 (2010), Decided April 20, 2010

FACTS: Congress enacted 18 U.S.C. §48 to criminalize the "commercial creation, sale, or possession of certain depictions of animal cruelty." The law does not criminalize the actual underlying acts, but only the portrayal of such activities. It was initially enacted to target "crush videos" - described as videos that showed women walking over animals, barefooted or in heels, while the animals squealed in pain. These videos purportedly appeal to individuals with a specific sexual fetish. The "acts depicted in crush videos are typically prohibited by the animal cruelty laws enacted by all 50 States and the District of Columbia." However, Stevens was a purveyor of old videos of dogfighting and dogs attacking other animals, and which included footage taken when dogfighting was not prohibited, allegedly. He was indicted. He moved for dismissal, arguing that his actions were protected by the First Amendment. His motion was denied. He was convicted at trial. He then appealed to the Third Circuit, which found §48 facially invalid and reversed his conviction, stating that it potentially covers a great deal of constitutionally protected speech.

The Government appealed, and the U.S. Supreme Court granted certiorari.

ISSUE: Is 18 U.S.C. §48 impermissibly overbroad and a violation of the First Amendment?

HOLDING: Yes

DISCUSSION: The Government argued that "the banned depictions of animal cruelty, as a class, are categorically unprotected by the First Amendment." The Court, however, noted that through the present, it had held restrictions on the content of speech in only a "few limited areas." The Court declined to "carve out from the First Amendment any novel exception to §48."

The Court stated that it reads the challenged law "to create a criminal prohibition of alarming breadth." Nothing in the law, for example, requires the depicted conduct to actually cruel, as it applies to any depiction in which "a living animal is intentionally maimed, mutilated, tortured, wounded or killed." It noted that the words wounded or killed do not carry any particular "cruel" connotation when given their ordinary meaning. The text makes no distinction between lawful and unlawful killing of an animal. Its plain meaning also suggests that a video depicting lawful conduct in one State may run afoul of the law if it "finds its way into another State where the same conduct is unlawful."

The Government encouraged the Court to look to the exceptions listed in the statute to allow much of the material that would otherwise be prohibited under its interpretation of §48. The Court noted that much speech does not fall into one of the listed categories. "Most hunting videos, for example, are not obviously instructional in nature, except in the sense that all life is a lesson." Instead, they are primarily entertainment or recreational.

The Government argued that it only prosecuted such cases when "extreme cruelty" is shown, but the Court noted that "the First Amendment protects against the Government: it does not leave us at the mercy of *noblesse oblige*." It declined to "uphold an unconstitutional statute merely because the Government promised to use it responsibly." In fact, the Justice Department announced, following the enactment of the legislation, that it would interpret (and prosecute) only depictions of "wanton cruelty to animals designed to appeal to a prurient interest in sex." The videos sold by Stevens do not fit that description.

The Court concluded that §49 was "substantially overbroad, and therefore invalid under the First Amendment." It affirmed the decision of the Third Circuit in favor of Stevens.

FULL TEXT OF OPINION: **http://www.supremecourt.gov/opinions/09pdf/08-769.pdf**

Perdue (Governor of Georgia) v. Kenny A.), 130 S.Ct. 1662 (2010), Decided April 21, 2010

FACTS: The original plaintiffs in the case are over 3,000 children in foster care in Georgia. The action was a class-action lawsuit against the state of Georgia and various named state officials, including the Governor. The case went to mediation and the parties entered into a consent decree, which resolved all issues except that fees to which the plaintiffs' attorneys were entitled to collect under 42 U.S.C. §1988 (also known as the Attorneys' Fees Act.).[327] The attorneys requested more than $14 million in fees, which included about $7 million for what is called the lodestar - a calculation of the attorney's usual fee times the hours expended on the case. The remainder was a "fee enhancement for superior work and results" - with the argument that the lodestar "would be generally insufficient to induce lawyers of comparable skill, judgment, professional representation and experience" to take on such a case. Georgia objected, contending that the hourly fees used to calculate the lodestar were excessive and that the "enhancement would duplicate factors that were reflected in the lodestar amount."

The District Court reduced the fee award to $10.5 million, after making certain adjustments. The lodestar was reduced to $6 million and then enhancing the award by 75% because of certain factors, including the extraordinary results and high degree of skill, professionalism and dedication shown by counsel. The Eleventh Circuit affirmed the decision. Georgia appealed and the U.S. Supreme Court granted certiorari.

ISSUE: May a reasonable attorneys' fee in a §1988 case be enhanced for factors already included in the lodestar calculation?

HOLDING: No (but see discussion)

DISCUSSION: The Court discussed the background of the Attorneys' Fees Act, a "fee-shifting statute." The default rule is that each party pays their own attorney's fees, but §1988 was enacted to "ensure that federal rights are adequately enforced." However, the statute provided no guidance as to how to determine a "reasonable" fee in such cases, leaving the decision to the "unlimited discretion" of the trial judge. The "lodestar approach" was first pioneered in Lindy, Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.[328] and "achieved dominance" in Hensley, Gisbrecht v. Barnart.[329]

[327] Although the case never specifically mentions it, presumably this case was brought under 42 U.S.C. §1983, since the opinion notes that the case was brought under both "federal and state constitutional" claims.
[328] 487 F.2d 161 (1973).
[329] 535 U.S. 789 (2002).

The Court noted the lodestar approach has "several important virtues," in that it "*roughly* approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case." It is "readily administrable" and objective and "produces reasonably predictable results." The Court defined "six important rules" that guided its decision.

First, the Court noted that a "'reasonable' fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case," which is the goal of the Act. Second, the "lodestar method yields a fee that is presumptively sufficient to achieve this objective." Third, although the Court had "never sustained an enhancement of a lodestar amount for performance," it had "repeatedly said that enhancements may be awarded in 'rare' and 'exceptional' circumstances." Fourth, however, the "novelty and complexity of a case" is not grounds for an enhancement because that should be reflected in the lodestar - as part of the usual billable hours. In addition, the quality of a particular attorney's work should also not be a factor, as such attorneys would normally also charge a higher billable rate. Fifth, the burden on proving a fee enhancement is to the fee applicant. Finally, sixth, the "fee applicant seeking an enhancement must produce 'specific evidence' that supports the award."

In the case at bar, the Court defined the issue as "whether either the quality of an attorney's performance or the results obtained are factors that may properly provide a basis for an enhancement." The Court noted that a superior result may not necessarily be "attributable to superior performance and commitment of resource by plaintiff's counsel," but instead may be the result of any number of other factors. An enhancement may be appropriate if f the method used to determine the lodestar "does not adequately measure the attorney's true market value," but in such a situation, the trial judge could adjust the hourly rate to an appropriate prevailing market rate. And enhancement may also be appropriate if they attorney takes on an "extraordinary outlay of expenses and the litigation is exceptionally protracted." The Court noted that attorneys who take on civil rights cases understand that they will not be reimbursed until the termination of the case, and noted that an enhancement could provide a "standard rate of interest to the qualifying outlays of expenses." The Court also agreed that an enhancement might be provided if there is an "exceptional delay in the payment of fees."

The Court concluded that the trial court did not "provide proper justification for the large enhancement that it awarded." The Court found that amount to be "essentially arbitrary," and seemingly unconnected to anything in the record that would justify the amount. Of note, the Court stated that although the plaintiffs' counsel did not receive fees while the case was pending, there was no indication this was "outside the normal range expected by attorneys who rely on §1988 for the payment of their fees or quantify the disparity." The Court considered it "essential that the [trial] judge provide a reasonably specific explanation for all aspects of a fee determination, including any aware of an enhancement." Without that, "adequate appellate review is not feasible," and awards may be, or have the appearance of, being the result of a judge's "subjective opinion regarding particular attorneys or the importance of the case." Notably, the Court added, "in future cases, defendants will have no way to estimate the likelihood of having to pay a potentially huge enhancement."[330]

The Court concluded:

> Section 1988 serves an important public purpose by making it possible for persons without means to bring suit to vindicate their rights. But unjustified enhancements that serve only to enrich attorneys are not consistent with the statute's aim.[8] In many cases, attorney's fees awarded under §1988 are not paid by the individuals responsible for the constitutional or statutory violations on which the judgment is based. Instead, the fees are paid in effect by state and local taxpayers, and because state and local governments have limited budgets,

[330] Marek v. Chesny, 473 U.S. 1 (1985).

money that is used to pay attorney's fees is money that cannot be used for programs that provide vital public services.

The Court reversed the lower court's decision and remanded the case for further proceedings.

NOTE: *Although this case does not involve law enforcement, the process for paying attorneys' fees in a §1988 case is exactly the same in a §1983 case involving law enforcement defendants.*

Renico (Warden) v. Lett, 130 S.Ct. 1855 (2010), Decided May 3, 2010

FACTS: Lett was charged with first degree murder and related charges, in Michigan, in 1996. His trial spanned six days, but only took a total of 9 hours, excluding deliberations. Deliberations began on June 12, 1997 and over two days, the jury sent out several notes, including a question as to what would occur if they could not agree. Shortly after noon on the second day, the judge brought the jury back into the courtroom to address the matter. The jury agreed that it was deadlocked, after being pressured for an answer by the judge. The judge declared a mistrial, dismissed the jury and set a new trial date. Neither the prosecution nor the defense objected. At the second trial, in November, 1997, Lett was convicted after under 4 hours of jury deliberation, of second-degree murder.

Lett appealed to the Michigan appellate courts, arguing that the mistrial was unnecessary and as such, he was entitled to the Double Jeopardy bar. The Michigan Court of Appeals agreed and reversed his conviction. The Michigan Supreme Court reversed the lower court and reinstated the conviction. Lett petioned for habeas corpus in the federal court, which the District Court granted. The Sixth Circuit affirmed that decision. Michigan petitioned for review, and the U.S. Supreme Court granted certiorari.

ISSUE: May a trial court judge declare a mistrial, when they find there is a manifest necessity to do so, without triggering Double Jeopardy?

HOLDING: Yes

DISCUSSION: The Court framed the question, and noted that the "clearly established Federal law" was "largely undisputed." In U.S. v. Perez, the Court agreed that "when a judge discharges a jury on the grounds that the jury cannot reach a verdict, the Double Jeopardy Clause does not bar a new trial for the defendant before a new jury."[331] The trial judge has the discretion to declare a mistrial whenever they find there is a "manifest necessity" to do so. Perez cautioned, however, that this power was to be exercised "with the greatest caution, under urgent circumstances, and for very plain and obvious causes." Later cases, however, have modified that ruling to some extent, [332] giving more latitude to the trial judge. Great deference is given to the judge's decision, in particular, when it comes to concluding a jury is deadlocked, and noted that to find otherwise might cause a judge to put undue pressure on a jury to reach a decision, to the detriment of the defendant.

Further, the Court had never required a trial judge to make an explicit, written finding or to put on the record the factors that led to the decision to declare a mistrial. Prior decisions had not required that the jury deliberate a minimum amount of time, that the jurors be questioned individually, or the judge to consult with, or obtain consent from, either the prosecutor or defense attorney, or to "consider any other means of breaking the

[331] 9 Wheat. 579, 22 U.S. 579 (1824)
[332] See Arizona v. Washington, 434 U.S. 497 (1978); Illinois v. Somerville, 410 U.S. 458 (1973); Gori v. U.S., 367 U.S. 364 (1961).

impasse." To this date, the Court noted, the Court had never overturned a judge's decision to declare a mistrial on the basis of manifest necessity.

However, in this matter, the federal court could only intervene if the Michigan Supreme Court's decision was unreasonable. The Court noted that the Michigan court's decision "involved a straightforward application of … longstanding precedent to the facts of Lett's case." Michigan had found no abuse of discretion by the trial judge. The Sixth Circuit had speculated on the judge's interpretations of the jury's actions, which the Court found to be improper.

The Court ruled that federal law prevented defendants from using federal habeas review to "second-guess the reasonable decisions of state courts." The Court found the Michigan Supreme Court's ruling, which reinstated Lett's conviction, to be not unreasonable. The Sixth Circuit's decision was reversed and the case remanded.

FULL TEXT OF OPINION: **http://www.supremecourt.gov/opinions/09pdf/09-338.pdf**

Lewis v. City of Chicago, 130 S.Ct. 2191JUS (2010). Decided May 24, 2010

FACTS: In July, 1995, Chicago gave a written examination for the Chicago Fire Department, to over 26,000 applicants. In 1996, it announced that it would begin a random draw from the top tier, those who scored 89 and above - calling them "well qualified." Those who scored under 65 were taken out of consideration. Those in the middle, classified as "qualified," were told that although they passed the test, it was not anticipated that they would be called for further processing, but that their names would be held on an eligibility list in case an insufficient number of those well-qualified failed to make the further cut.

Starting on May 16, 1996, and over the following 6 years, Chicago made a total of 10 draws. In the final round it exhausted the pool of "well qualified" applicants and began to draw from the "qualified" pool.

On March 31, 1997, Smith, an African-American applicant who had scored in the "qualified" range filed a charge of discrimination with the EEOC, and was quickly joined by five others who were similarly situated. The EEOC granted them "right-to-sue" letters and the six filed an action against Chicago. Class-action status was sought, and eventually, 6,000 similarly situated individuals were identified as potentially members of the class - "African-Americans who scored in the 'qualified' range on the 1995 examination but had not been hired."

The City demanded summary judgment - arguing that the class members had failed to file their EEOC claims within 300 days after their claims accrued, but the trial court found that the "continuing reliance" on the test results was a "continuing violation" of Title VII, the relevant law. The City stipulated that the 89-point cutoff had a disparate effect on African-American applicants, but argued that it needed the cutoff for business necessity.

Following a bench trial, the District Court ruled in favor of the class members and ordered the City to hire 132 random members of the class. It awarded back pay to the remaining class members. The City appealed and the Seventh Circuit reversed, finding the filing to have been untimely. It identified the discriminatory act (which was the point at which the 300 days would begin) to have been the initial sorting of the scores. The class members appealed and the U.S. Supreme Court granted certiorari.

ISSUE: Does a disparate impact claim require a showing of a discriminatory intent?

HOLDING: No

DISCUSSION: The Court noted that there was no dispute that everything occurred within the time period except for the initial selection. As such, the "real question, then, is not whether a claim predicated on that conduct is timely, but whether the practice thus defined can be the basis for a disparate-impact claim *at all*." The Court looked to the history of Title VII and noted that it initially did not cover "disparate impact" cases. In Griggs v. Duke Power Co., however, the Court had ruled that it could be interpreted to extend to such cases.[333] Eventually, the Griggs decision was codified by statute. The matter was most recently discussed in Ricci v. DeStefano[334] - and a "plaintiff [who] establishes a prima facie disparate-impact claim by showing that the employer '*uses* a particular employment practice that causes a disparate impact" may be successful.

The Court agreed that the process described is, in fact, an "employment practice" and that each time a new class was filled, it made use of the practice. The Court stated that although disparate-treatment claims require a discriminatory intent and a deliberate discriminatory intent within the required time frame, but "for claims that do not require discriminatory intent, no such demonstration is needed." Disparate impact claims do not require that discriminatory intent.

Although the Court agreed that the result in this case might present practical problems for employers who have used this method for years, it left it for Congress to repair the problem. The Court reversed the decision of the Seventh Circuit and remanded the case back for further proceedings as indicated by the opinion.

Berghuis (Warden) v. Thompkins, 130 S.Ct. 2250 (2010), Decided June 1, 2010

FACTS: A shooting occurred in Southfield (Michigan) on January 10, 2000. Morris died from multiple gunshot wounds; France survived and later testified. Thompkins, the suspect, fled, but was apprehended a year later in Ohio.

Southfield officers traveled to Ohio to question Thompkins, who was "awaiting transfer to Michigan." At the beginning of the interrogation, Officer Helgert provided Thompkins with his Miranda[335] rights in writing. The officer had Thompkins read the last provision of the warnings out loud to ensure that Thompkins could read and presumably understand English. Helgert read the other four warnings to Thompkins and he signed the form. There was conflict in the record as to whether Thompkins was asked, or verbally confirmed, that he understood his rights.

During the ensuing 3 hour interrogation, "at no point … did Thompkins say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney." He was "largely silent," but did occasionally give a limited verbal response, such as yes, no or a comment such as "I don't know." He also refused a peppermint and mentioned that the chair he was sitting on was hard. Toward the end of the interrogation, one of the officers asked Thompkins if he believed in God and Thompkins's eyes "welled up with tears." Thompkins agreed he prayed to God. Officer Helgert then asked him, "Do you pray to God to forgive you for shooting that boy down?" Thompkins responded "yes" and looked away. He refused to give a written confession and the interrogation ended some 15 minutes later.

Thompkins was charged with murder, assault and related firearms offenses. He moved for suppression of his statements, arguing that he had invoked his Fifth Amendment rights and that interrogation should have then ended.[336] The trial court denied the motion.

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[333] 401 U.S. 424 (1971).
[334] 557 U.S. --- (2009).
[335] Miranda v. Arizona, 384 U.S. 436 (1966).
[336] Michigan v. Mosley, 423 U.S. 96 (1975).

Thompkins was convicted and appealed. The Michigan appellate courts denied his argument that the statements should have been suppressed, holding that he had "not invoked his right to remain silent." Thompkins filed a petition for habeas corpus in the U.S. District Court, which also rejected his claim, stating that the state court's decision was not "contrary to, or involved an unreasonable application of clearly established federal law."[337] "The District Court reasoned that Thompkins did not invoke his right to remain silent and was not coerced into making statements during the interrogation."

Thompkins appealed to the U.S. Court of Appeals for the Sixth Circuit, which reversed. The Sixth Circuit "acknowledged that a waiver of the right to remain silent need not be express, as it can be 'inferred from the actions and words of the person interrogated.'"[338] However, it's recitation of the facts indicated that it believed that "Thompkins was silent for two hours and forty-five minutes" and that silence offered a "clear and unequivocal message to the officers: Thompkins did not wish to waive his rights." (The Court also ruled in his favor on an unrelated assistance-of-counsel issue.) The Warden (as the respondent in a habeas petition) requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Must a subject unambiguously and unequivocally invoke the right to silence?

HOLDING: Yes

DISCUSSION: The Court reviewed the history of the Miranda ruling and noted that all of the parties conceded "that the warning given in this case was in full compliance with these requirements." Instead, the dispute in this case "centers on the response – or nonresponse – from the suspect" following the warnings being given. Thompkins argued that he remained silent "for a sufficient period of time so the interrogation should have 'ceas[d]' before he made his inculpatory statement."[339] However, the Court noted, in Davis v. U.S., it had "held that a suspect must do so 'unambiguously.'"[340]

The Court continued:

> The court has not yet stated whether an invocation of the right to remain silent can be ambiguous or equivocal, but there is no principled reason to adopt different standards for determining when an accused has invoked the Miranda right to remain silent and the Miranda right to counsel at issue in Davis.

Further, it ruled that "there is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously." Such a requirement avoids forcing law enforcement officers "to make difficult decisions about an accused's unclear intent and face the consequences of suppression 'if they guess wrong.'"[341]

The Court then considered whether, in fact, Thompkins waived his right to remain silent.

The Court continued:

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[337] 28 U.S.C. §2254(d)(1).
[338] North Carolina v. Butler, 441 U.S. 369 (1979).
[339] Mosley, supra.
[340] 512 U.S. 452 (1994).
[341] See Moran v. Burbine, 475 U.S. 412 (1986).

> The waiver inquiry "has two distinct dimensions": waiver must be "voluntary in the sense that it was the produce of a free and deliberate choice rather than intimidation, coercion, or deception," and "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[342]

Decisions since Miranda demonstrate "that waivers can be established even absent formal or express statements of waiver that would be expected in, say, a judicial hearing to determine if a guilty plea has been properly entered." The prosecution, as such, "does not need to show that a waiver of Miranda rights was express." Instead, an "implicit waiver" is "sufficient to admit a suspect's statement into evidence."[343] It is to the prosecution to make an adequate showing that the accused understood Miranda rights, as given. Once that is done, however, "an accused's uncoerced statement establishes an implied waiver of the right to remain silent."

Further:

> Although Miranda imposes on the police a rule that is both formalistic and practical when it prevents them from interrogating suspects without first providing them with a Miranda warning, it does not impose a formalistic wavier procedure that a suspect must follow to relinquish those rights.

Miranda rights can be waived through more informal means than a "typical waiver on the record," which generally requires a verbal invocation. The Court found no "contention" on the record that Thompkins did not understand his rights, but instead, found "more than enough evidence in the record" that he did. His response to the officer's final question was a "course of conduct indicating waiver" of the right to remain silent – he could have remained silent or invoked his Miranda rights at that time, or any time earlier, ending the interrogation. The fact that would have been three hours after the warning was given was immaterial and "police are not required to rewarn suspects from time to time." This is further confirmed in that he gave "sporadic answers to questions throughout the interrogation." The Court found no evidence of coercion or threat, as neither, the length of time nor the conditions of the interrogation were not such as would put him in physical or mental distress. Appealing to his religious beliefs (moral and psychological pressures) did not make the interrogation improper.[344]

Thompkins also contended that the police could not question him until they obtained a waiver, but again, the Court noted that Butler foreclosed this line of argument.

The Court stated:

> Interrogation provides the suspect with additional information that can put his or her decision to waive, or not to invoke, into perspective. As questioning commences and then continues, the suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or to cooperate. When the suspect knows that Miranda rights can be invoked at any time, he or she has the opportunity to reassess his or her immediate and long-term interests. Cooperation with the police may result in more favorable treatment for the suspect; the apprehension of accomplices; the prevention of

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[342] Id.
[343] Butler, supra.
[344] Oregon v. Elstad, 470 U.S. 298 (1985).

continuing injury and fear; beginning steps towards relief or solace for the victims; and the beginning of the suspect's own return to the law and the social order it seeks to protect.

The Court affirmed that in order for a statement (under interrogation) to be admissible, the accused must have been properly given, and understood, the Miranda warnings. The Court would then look for an express or implied waiver but the Court agreed that officers need not obtain a waiver before commencing an interrogation.

The Court agreed that the statements were admissible and reversed the decision of the Sixth Circuit on the issue. The Court also ruled on an unrelated question with respect to jury instructions, and found no prejudice to Thompkins. The Court remanded the case to the lower court to deny the habeas petition.

FULL TEXT OF OPINION: http://www.supremecourt.gov/opinions/09pdf/08-1470.pdf

Carr v. U.S., 130 S.Ct. 2229 (2010), Decided June 1, 2010

FACTS: Carr became a sex offender subject to registration in 2004, in Alabama. In late 2004/early 2005, he relocated from Alabama to Indiana, prior to the enactment of the federal Sex Offender Registration and Notification Act (SORNA), which made it a violation of federal law to fail to register in a new state when a sex offender relocates. He did not register with Indiana, and was indicted in 2006 for that failure. He moved to dismiss, arguing that his travel occurred before SORNA made it a requirement to register following relocation. His motion to dismiss was denied by the trial court, and he took a conditional guilty plea. He then appealed, and the Seventh Circuit upheld the trial court's position.

Carr requested review and the U.S. Supreme Court granted certiorari.

ISSUE: Does SORNA apply to a sex offender's interstate travel that occurred *prior* to its enactment?

HOLDING: No

DISCUSSION: The Court reviewed the language and history of SORNA. The Government's position was that so long as the travel occurred after the date SORNA became effective, registration was required, while Carr argued that the travel had to post-date the enactment date. The Court concluded that "Carr's interpretation better accords with the statutory text."

The Court reversed the decision of the Seventh Circuit and remanded the matter to the lower court for further proceedings.

Holder, Attorney General v. Humanitarian Law Project, 130 S.Ct. --- (2010), Decided June 21, 2010

FACTS: The plaintiffs in the case are several individuals who wish to "provide support for the humanitarian and political activities" of the Partiya Karkeran Kurdistan (PKK) - an organization with an aim of establishing an independent Kurdish state in Turkey and the Liberation Tigers of Tamil Eelam (LTTE), which has the goal of "creating an independent Tamil state in Sri Lanka." The United States had identified both as having "committed numerous terrorist attacks, some of which have harmed American citizens." The LTTE's status as a "foreign terrorist organization" had been upheld by the D.C. federal circuit, the PKK did not challenge its designation. The Court noted that the decision to so designate a group falls to the Secretary of State, and that the two groups in question were among 30 named in 1997.

The plaintiffs, however, filed suit, arguing that the federal law prohibiting the provision of material support to foreign terrorist organizations, 18 U.S.C. §2339B, was unconstitutional, and that they wished to support the "lawful, nonviolent activities" of the two groups. After a lengthy litigation history, the case has focused on a challenge to the "prohibition on providing four types of material support—"training," "expert advice or assistance," "service," and "personnel"—asserting violations of the Fifth Amendment's Due Process Clause on the ground that the statutory terms are impermissibly vague, and violations of their First Amendment rights to freedom of speech and association."

The District Court ruled that they plaintiffs were unlikely to be successful in their First Amendment speech and association claims, but that certain terms in the statute were "impermissibly vague." The Court of Appeals agreed, further stating that it was "easy to imagine protected expression that falls with the bounds" of certain terms in the statute. During the pendency of the action, following the events of 9/11/2001, the PATRIOT Act added "expert advice or assistance" to the definition of "material support or resources." The plaintiffs filed a second action challenging the constitutional of that term, as well. The District Court denied a motion to dismiss the case, finding that there was sufficient reason for the plaintiffs to find their protected expression chilled, and that the term was also impermissibly vague. The Court rejected their First Amendment claims, however, on the added term.

During the ensuing years, both actions moved forward, and further legislation clarified certain points related to the statute. Eventually the two actions were consolidated. The 9th Circuit ruled that the First Amendment issues were dismissed, but that the terms were facially vague. The Government petitioned for certiorari, and the plaintiffs filed a cross-petition. Both were granted.

ISSUE: Is the prohibition in 18 U.S.C. §2339B against material support, including training and expert advice or assistance unconstitutionally vague?

HOLDING: No

DISCUSSION: First, the Court clarified the actual issue - whether the terms in question, in the statute, were unconstitutionally vague. The plaintiffs argued that they violated the Due Process Clause of the Fifth Amendment, as well as their First Amendment right to freedom of speech and association. Specifically, they argue that the statute "prohibits them from engaging in certain specified activities" which are listed in the opinion.

Because the plaintiffs were acting for "preenforcement review of a criminal statute" - the Court first had to decide if it was in fact ripe for such review. The Court concluded that it did, because there was a credible threat of prosecution.

The Court then noted that since its initial enactment, Congress had added "narrowing definitions to the material support statute over time" which "increased the clarity of the statute's terms." Specifically, the terms were "clear in their application to the plaintiffs' proposed conduct." As for the Free Speech issue, the Court noted that the "plaintiffs may say anything they wish on any topic." They may also become members of said organizations. The Court stated that the question is whether the "Government may prohibit what plaintiffs want to do—provide material support to the PKK and LTTE in the form of speech."

The Court, however, agreed that "any contribution" to the activities of a terrorist act is not limited to monetary support only - as the plaintiffs argued. The removal, by Congress, of an exception for humanitarian aid, demonstrated that it "considered and rejected the view that ostensibly peaceful aid would have no harmful effects." The court noted that both are "deadly groups" that have engaged in extensive terrorist activities.

Providing support for peaceful activities simply "frees up other resources within the organization that may be put to violent ends" and lends legitimacy to the organization that makes it easier to recruit both for members and additional funding, which leads in turn to more terrorist attacks. Many "conceal their activities behind charitable, social, and political fronts." They do not have firewalls to segregate their financial resources.

Following a lengthy and detailed discussion, the Court found in favor of the Government's position on all three issues, and remanded the case for further proceedings.

FULL TEXT OF OPINION: **http://www.supremecourt.gov/opinions/09pdf/08-1498.pdf**

McDonald v. City of Chicago, 130 S.Ct. --- (2010_ , Decided June 28, 2010

FACTS: McDonald, along with other citizens of Chicago and Oak Park (a suburb of Chicago) challenged local ordinances that effectively banned the private possession of handguns, even in the home. The District Court upheld the ordinance and the 7th Circuit Court of Appeals affirmed.

McDonald requested review and the U.S. Supreme Court granted certiorari.

ISSUE: Is the Second Amendment right to keep and bear arms incorporated in the States by the Fourteenth Amendment?

HOLDING: Yes

DISCUSSION: The Court engaged in a lengthy review of the history of the right to bear arms in the United States, as well as the history of the Fourteenth Amendment, ratified following the Civil War. The Court acknowledged the confusion concerning the central issue of whether the Bill of Rights (specifically the first eight) became mandatory in the states following the enactment of the Fourteenth Amendment, but recognized that it was unnecessary to decide that issue - that the only issue at hand was whether the Second Amendment was incorporated.

The Court noted that the decisions[345] upon which the Seventh Circuit relied "all preceded the era in which the court began the process of 'selective incorporation' under the Due Process Clause" [of the Fourteenth Amendment]. Through that process, gradually, most of the provisions of the Bill of Rights have been individually applied to the states, one notable exception, however, is the Sixth Amendment clause that requires a unanimous verdict in a criminal trial. That remains a decision for individual states.

The Court stated that its decision in [District of Columbia v.] Heller[346]"points unmistakably to the answer" in this case. In Heller, it emphasized:

> Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in Heller, we held that individual self-defense is '*the central component*' of the Second Amendment right."

Heller also made it quite clear that handguns were often the first choice to defend one's home, and that this right was "deeply rooted in [the] Nation's history and tradition." The Court noted that "the right to keep and bear arms was also widely protected by state constitutions at the time when the Fourteenth Amendment was

[345] See U.S. v. Cruikshank, 92 U.S. 542 (1876); Presser v. Illinois, 116 U.S. 252 (1886); Miller v. Texas, 153 U.S. 535 (1894).
[346] 554 U.S. --- (2008).

ratified, immediately following the Civil War. For example, in Kentucky, Article XII, §23, of the First Constitution, ratified in 1792, reads as follows:

> The rights of the citizens to bear arms in defense of themselves and the State shall not be questioned.

Similar provisions have remained a part of the Kentucky Constitution to the present day.

The Court discounted the many arguments put forth by Chicago (and amici parties), refusing to hold that the Second Amendment should not be considered a fundamental right. It did, however, agree that its holdings, both in Heller and the case at bar, "did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or law imposing conditions and qualifications on the commercial sale of arms.'" The Court emphatically stated that despite Chicago's "doomsday proclamations, incorporation does not imperil every law regulating firearms."

The Court concluded that the right to bear arms is a fundamental right and that the Second Amendment is incorporated to the states by the Fourteenth Amendment. The decision of the 7th Circuit Court of Appeals was reversed and the case remanded for further proceedings.

FULL TEXT OF OPINION: **http://www.supremecourt.gov/opinions/09pdf/08-1521.pdf**

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NOTES

While many of these cases involve multiple issues, only those issues of interest to Kentucky law enforcement officers are reported in these summaries. In addition, a case is only reported under one topical heading, but multiple issues may be referenced in the discussion. Readers are strongly encouraged to share and discuss the case law and statutory changes discussed herein with agency legal counsel, to determine how the issues discussed in these cases may apply to specific cases in which your agency is or may be involved.

Non-published opinions may be included in this update and will be so noted, see below for specific caveats regarding these cases. Cases that are not final at the time of printing are not included. When relevant opinions are finalized, they will be included in future updates. As such, each update may include cases that were decided earlier, but were held for finality.

All quotes not otherwise cited are from the case under discussion. Certain cases, because they appear so often and in cases not specific to their topic matter, do not have their citations included in the footnotes. Their full citations are:

Miranda v. Arizona, 384 U.S. 436 (1966)
Terry v. Ohio, 392 U.S. 1 (1968)

Nost language in italics in the body of the summary is directly from an search warrant affidavit, and all errors are from the original.

NOTES REGARDING UNPUBLISHED CASES

FEDERAL CASES:

Unpublished Cases carry a "Fed. Appx." Or Westlaw (WL) citation.

Sixth Circuit cases that are noted as "Unpublished" or that are published in the "Federal Appendix" carry the following caveat:

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KENTUCKY CASES:

Unpublished Cases carry the Westlaw (WL) citation.

Kentucky cases that are noted as "Unpublished" carry the following caveat:

Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

UNPUBLISHED CASES
Unpublished opinions shall never be cited or used as authority in any other case in any court of this state. See KY ST RCP Rule 76.28(4).